85-2157

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE ALUMINUM ASSOCIATION, INC.,
and
NATIONAL ASSOCIATION OF
RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 204 of the Staggers Rail Act of 1980 (49 U.S.C. § 10731(e)) required the railroads (appellants below) to "reduce and thereafter maintain" rates on non-ferrous recyclable commodities at or below maximum levels to be determined by the Interstate Commerce Commission in accordance with the statute, and delegated to the Commission full authority to issue all orders necessary to implement this provision. The questions presented are:

1. Does Section 204 prohibit the Commission from ordering reductions in rail rates on individual movements of non-ferrous recyclable commodities so that all such such rates would be at or below the maximum levels prescribed by the Commission?

2. Does the time limitation for review under the Hobbs Act (28 U.S.C. §§ 2342, 2344) prohibit the railroads from challenging a ruling contained in an order of the Interstate Commerce Commission issued two years prior to filing the petition for review?

PARTIES TO THE PROCEEDING

Petitioners in The Court of Appeals

Atchison, Topeka & Santa Fe Railway Company
Baltimore and Ohio Chicago Terminal Railroad Company
Baltimore & Ohio Railroad Company
Boston & Maine Railroad
Burlington Northern Railroad Company
Chesapeake and Ohio Railway Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Chicago and North Western Transportation Company
Chicago, Rock Island & Pacific Railroad Company
Cincinnati, New Orleans & Texas Pacific Railway Company
Delaware and Hudson Railway Company
Denver and Rio Grande Western Railroad Company, The
Elgin, Joliet and Eastern Railway Company
Grand Trunk Western Railroad Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad Company
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Norfolk & Western Railway Company
Oklahoma, Kansas and Texas Railroad Company
Pittsburgh & Lake Erie Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
San Diego and Arizona Eastern Transportation Company

Santa Maria Valley Railroad Company
Seaboard System Railroad, Inc.
Soo Line Railroad Company
Southern Railway Company
Southern Pacific Transportation Company
Terminal Railroad Association of St. Louis
Texas Mexican Railway Company, The
Ventura County Railway Company
Vermont Railway, Inc., The
Winston-Salem Southbound Railway Company

Intervenors in Support of Petitioners in The Court of Appeals

Consolidated Rail Corporation

Respondents in The Court of Appeals

Interstate Commerce Commission
United States of America

Intervenors in Support of Respondents in The Court of Appeals

The Aluminum Association, Inc.*
Fort Howard Paper Company

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*Member companies include: Alcan Aluminum Corporation, Alflex Corporation, Algonquin Industries, Inc., Aluminum Castings & Engineering Co., Aluminum Company of America, Aluminum Mills Inc., Alumax Inc., American Aluminum Casting Company, Anchor-Harvey Components Inc., ARCO Metals Company, Atomized Metal Powders Inc., Barmet Industries Inc., Bodine Aluminum Inc., Botsford Chemical Company, Clendenin Brothers Inc., Cliff Impact Division (Division of Parker-Hannifin), Concise Casting Corporation, Consolidated Aluminum Corporation, Copperweld Corporation (Wire and Cable Division), Cressona Aluminum Company,

National Association of Recycling Industries, Inc.**
Reynolds Metal Company

Durable Wire, Inc., Eastern Casting Corporation, Eck Industries Inc., Ekco Products Inc., Elkem Metals Company, Ethyl Corporation, Extruded Metals (An Indian Head Company), Foote Mineral Company, Fort Wayne Foundry Corp., General Extrusions Inc., Golden Recycle Company, Hall Foundries & Manufacturing, Inc., Harris Metals Inc., Hitchcock Co., Jarl Extrusions Inc., Kagan-Dixon Wire Corporation (Sub. of Southwire Company), Kaiser Aluminum & Chemical Corporation, KBI Division, Cabot Corporation, Luxfer U.S.A. Limited, Magnode Corporation, Mansfield Brass & Aluminum Corporation, Martin Marietta Aluminum Inc., Metal Impact Corporation, Milward Alloys Inc., Minalex Corporation, Morel Foundry Corporation, National Aluminum Corporation (Sub. of National Steel Corporation), National Northeast Corporation, New Jersey Aluminum Company, Nichols-Homeshield Inc., Noranda Aluminum Inc., Norandex Inc., Norsk Hydro Aluminum Inc., Permold Corp., Pimalco, Precision Extrusions Inc., Progress Foundries, (Div. of Acrometal Companies Inc.), Quality Aluminum Casting Co., Reliable Castings Corporation, Reynolds Metals Company, RJR Archer Inc., Ross Aluminum Foundries, S-G Metals Industries Inc., Shaped Wire, Inc., Southwire Company, Stahl Specialty Company, Sunset Foundry Company Inc., Tower Extrusions Inc., Transmet Corporation, United Aluminum Corporation, United States Bronze Powders Inc., U.S. Reduction Company, Valimet Inc., V.A.W. of America Inc., Vulcan Materials Company, Warner Manufacturing Corporation, Weber Metals Inc., Wellman Dynamics Corporation, R.D. Werner Company Inc., Willard Bronze Co. Inc.

**A trade association for the recycling industry with no Rule 28.1 affiliates.

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OPINIONS BELOW

The two basic opinions of the Interstate Commerce Commission involved here are set forth in the appendix at pages 25a and 96a. The opinion of the Court of Appeals (Judge Starr dissenting) is reported at 768 F.2d 373 (D.C. Cir. 1985), hereinafter referred to as NARI VI, and is set forth at App. 1a. The Court's orders denying rehearing, suggestion of rehearing *en banc* and the petition for clarification are unreported and are set forth in the appendix at pages 110a, 111a and 113a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1985. App. 1a. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 4 1986 (App. 110a, 111a) and this petition was filed within ninety days of that date. Jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTES INVOLVED

Section 204 of the Staggers Rail Act of 1980, 49 U.S.C. § 10731(e), provides as follows:

> (e) Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase.

> The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.

The Hobbs Act (28 U.S.C. §§ 2342 and 2344) provides in pertinent part as follows:

> 28 U.S.C. § 2342. Jurisdiction of the court of appeals.
>
> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of — . . .
>
> (5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title.
>
> Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.
>
> 28 U.S.C. § 2344. Review of orders; time; notice, contents of petition; service.
>
> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of —
>
> (1) the nature of the proceedings as to which review is sought;
>
> (2) the facts on which venue is based;
>
> (3) the grounds on which relief is sought; and
>
> (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

STATEMENT OF THE CASE

Section 204 of the Staggers Rail Act of 1980, 49 U.S.C. § 10731(e), was the last of three statutes designed to require railroads to reduce rates on recyclable commodities.[1] Those attempts by Congress to rationalize rail freight rates for the recyclable industry spawned six trips to the United States Court of Appeals for the District of Columbia Circuit.[2] The first five decisions of the Court of Appeals consistently supported the Congressional purpose of reducing the rate structure on recyclable commodities, ruling that it was incumbent on the Commission to reduce all rates on non-ferrous recyclable commodities, whatever the nature.

NARI VI, the decision involved in this Petition, represents a radical and unwarranted departure from the prior

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[1]P.L. No. 93-236, 87 Stat. 985 (1973), 49 U.S.C. § 10710; P.L. No. 94-210, 90 Stat. 31 (1976), 49 U.S.C. § 10731(a)-(d); P.L. No. 96-448, 94 Stat. 1895 (1980), 49 U.S.C. § 10731(e).

[2]*National Assn'n of Recycling Industries v. ICC*,585 F.2d 522 (D.C. Cir. 1978) (hereinafter *NARI I*); *National Ass'n of Recycling Industries v. ICC*, 627 F.2d 1328 (D.C. Cir. 1980), *mod. sub nom. Consolidated Rail Corp. v. National Ass'n of Recycling Industries*, 449 U.S. 609 (1981) (hereinafter *NARI II*); *National Ass'n of Recycling Industries v. ICC*, 660 F.2d 795 (D.C. Cir. 1981) (hereinafter *NARI III*); Baltimore & Ohio R. Co. v. ICC, No. 82-1066, slip. op. (D.C. Cir. June 9,1982, printed in Appendix at ____a) (hereinafter *NARI IV*); *National Ass'n of Recycling Industries v. ICC*, 704 F.2d 638 (D.C. Cir. 1983) (hereinafter *NARI V); Norfolk & Western R. Co. v. ICC*, 768 F.2d 373 (D.C. Cir. 1985) (hereinafter *NARI VI*).

decisions of the District of Columbia Circuit and a new and unsupportable construction of Section 204 of the Staggers Rail Act of 1980. That the suggestion for rehearing *en banc* was denied by a seven to four vote is clear evidence of a sharp division within the Circuit Court and further suggests the need for review by this Court.

The appeal arose in a bizarre manner. The sequence of events is of critical importance in understanding the issues involved. The chronology is as follows:

1. Section 204 of the Staggers Rail Act of 1980, effective October 1, 1980, directed all rail carriers to reduce rates to levels prescribed by the Interstate Commerce Commission by January 1, 1981.

2. On December 30,1980, the Interstate Commerce Commission prescribed a maximum rate level equal to 146% of variable cost. Ex Parte 394, *Cost Ratio for Recyclables - 1980 Determination,* 364 ICC 425, 426 (1980). The Commission, however, refused to require the railroads to reduce recyclable rates to that level.

3. On appeal, the District of Columbia Circuit held that Section 204 of the Staggers Rail Act required immediate reductions on non-ferrous recyclable rates exceeding 146% of cost (*NARI III,* 660 F.2d at 802).

4. On remand, the Interstate Commerce Commission issued its order in Ex Parte 394 of October 13, 1981 (App. 96a), which required the railroads to (a) reduce their rates to 146% of cost; (b) pay shippers refunds of excess charges collected since January 1, 1981; (c) implement the reduction in rates by utilizing average territorial revenue-to-cost data developed by the railroads in a prior general revenue proceeding; and (d) authorize complaints by individual shippers whose rates still exceeded the maximum level af-

ter the territorial rate reductions. This is one of the two Commission orders involved herein.

5. The railroads immediately appealed from that part of the Commission's order which awarded refunds. On June 9, 1982, the D.C. Circuit, in an unpublished opinion, affirmed the Commission's authority to issue refunds. *NARI IV*, App. 107a.

Subsequent to the Court's decision in *NARI IV*, The Aluminum Association filed a complaint on behalf of its shipper members in accordance with the Commission's order of October 13, 1981. Numerous other shippers, including members of the National Association of Recycling Industries, Inc. ("NARI"), also filed specific rate complaints and most of the proceedings have been processed through the initial decision stage.

6. Two major railroads, Consolidated Rail Corporation ("Conrail") and the Chessie System ("Chessie"), implemented the Commission's order by publishing cost sensitive proportional rate scales applicable on their lines at levels no higher than 146% of cost. The rate action taken by Conrail and Chessie was approved by the Commission. This resulted in cancellation of joint rates by other carriers and the application of combination rates which were, in many cases, higher than the joint rates which the Commission had ordered reduced. On appeal, the D.C. Circuit ordered the Commission to determine proper rates for all carriers which would bring all rates to a level below the 146% benchmark. *NARI V*, 704 F.2d at 640.

7. On December 6, 1982, the Commission served a further decision to evaluate compliance with its orders for reduced rates. In that decision, the Commission noted that individual shippers may file formal complaints concerning movements which they contend are above 146% of cost after the territorial reductions took place. App. 90a.

8. On May 20, 1983, the Commission entered yet another order in Ex Parte 394 and again ruled that the scope of its order issued in 1981 applied to all rates on all non-ferrous recyclables. App. 64a.

9. The railroads then filed a Petition for Clarification or Declaratory Order asking the Commission to rule that individual complaints by shippers with rates above 146% would be prohibited since the railroads had implemented the territorial reductions ordered by the Commission. On July 20, 1983, the Commission reiterated its initial ruling issued October 13, 1981 that the maximum rate level applied to all individual rates and that shippers whose rates were still above 146% of cost could file complaints with the Commission and request refunds. App. 44a - 45a.

Respondent railroads petitioned for review of the July 20, 1983 order of the Commission which resulted in the Court of Appeals' opinion in *NARI VI,* which held that Section 204 did not contemplate reductions in all rail recyclable rates – only average rates. App. 17a. The Court therefore held that the complaints pending before the Commission were invalid. It cannot be emphasized too strongly that the Commission order appealed from, the July 20, 1983 order, was in fact only a reaffirmation of the Commission's procedure set forth in its order of October 13, 1981. Thus *NARI VI* struck down an order which had already been affirmed once on appeal on one issue and which had been effective without challenge as to the rest of the issues for nearly two years.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Frustrates the Purpose of Section 204

It is clear that Congress considered that a rationalization of the rail rate structure on non-ferrous recyclable commodities was essential to stimulate the efficient and economical utilization of solid waste in the United States. Three legislative attempts and six decisions of the Court of Appeals are ample testimony that this is an issue to which Congress attached considerable significance and that there has been a long history of legal efforts on the part of the railroad industry to frustrate the implementation of the statutory purpose.

The language of Section 204 is relatively simple. Its purpose is plainly stated in uncomplicated terms. The railroads were required to reduce rates to levels prescribed by the Commission. The Commission's order was thus a maximum rate order. Under any conceivable context, the act of charging rates above a level determined by the Commission to be a maximum reasonable level is unlawful.[3] Thus, common sense and plain English logically lead to the conclusion that Congress intended that all rail rates on non-ferrous recyclable commodities be maintained at levels below the maximum.

The Court of Appeals in its majority opinion, however, ruled that Section 204 did not mean what it said. Under the Court's interpretation, the first sentence of the statute only required the railroads to reduce average rates to the level prescribed by the Interstate Commerce Commission.

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[3] *A.J. Phillips Company v. Grand Trunk Western Railway Co.*, 236 U.S. 662 (1915); *Farmers Union Supply Company v. A.T. & S.F. Ry. Co.*, 219 ICC 486, 489-90 (1937); *ICC. v. Atlantic C.L.R. Co.*, 334 F.2d 46, 50 (5th Cir. 1964).

The second sentence, according to the Court's interpretation, means that individual rates cannot be increased so long as they remain above the maximum level prescribed by the Commission. The term "rates" thus has a different meaning in the two sentences under the lower Court's reasoning. In the first sentence "rates" means average rates while in the second sentence "such rates" means individual rates.

The statute, of course, does not make any such distinction. The majority reasoned, however, that such an interpretation was necessary in order to reconcile the second sentence of the statute which contemplated that some rates would remain above the mandated maximum.

The apparent ambiguity found by the Court of Appeals arising out of the language in the second sentence is vastly overstated. The second sentence prohibiting increases must be interpreted in the context of the rapidly escalating rate structure which saw ten generally applicable rate increases incorporated into the rate structure on recyclables before the mandated reduction could be implemented.[4] Congress simply tried to forestall the application of a series of increases added onto the rate structure before the required reductions could take place.

In *NARI III,* the Court ruled the Commission must immediately reduce rates on recyclable commodities. *NARI III,* 660 F.2d at 802. In the course of its opinion, the Court referred to statements by sponsors of the Staggers Act. *Id.* at 800-801. Excerpts from such statements were printed in the Commission's original cost ratio determination, *Cost*

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[4]The increases implemented by the railroads in 1980 and 1981 and applied to recyclable commodities were X-375(A), X-311(B), X-375(C), X-386, X-311(C), X-311(D), X-311(E), X-001, X-002, X-003.

Ratio for Recyclables - 1980 Determination, 364 ICC 425 (1980). It is significant that the excerpt from Senator Long's statement addressed the meaning of the second sentence. Senator Long stated:

> The language – "as long as any such rate equals or exceeds such revenue-to-variable cost ratio cap established by the Commission, such rate shall not be required to bear any further increase" – was included in Section 204 of the 1980 Act to prevent any rate increases on recyclables during periods which intervene each year between the Commission's annual establishment of "cap" and actions taken by the railroads actually "to reduce" rates to the new annual "cap" level in situations where the "cap" may be reduced. 364 ICC at 427-28.

Senator Long's comment fully explains the second sentence and deflates the convoluted hypotheses on which the "ambiguity" found by the majority were based.

In essence, the majority of the Court of Appeals has ruled that the Commission is precluded by Section 204 from ordering the railroads to reduce all rates to the maximum level contemplated by Congress. There is nothing in the legislative history which supports such a radical conclusion. There is nothing in the statutory language which remotely suggests that Congress intended that the railroads be permitted to select which rates should be maintained above the statutory maximum and those which would be correspondingly maintained below the maximum level. Had the Commission simply ordered the railroads to reduce all rates to the maximum level without the intermediate territorial reduction, it seems hardly likely that any court would have held such action contrary to the statute. Yet this is the inescapable result of the Court's inter-

pretation of the statute and its action in barring shippers from seeking relief for their individual rates which are above the cap.

In concluding that Section 204 of the Staggers Act only required the railroads to reduce average rates to the maximum levels set by the Commission, the Court of Appeals was obviously influenced by its aversion to the two-stage implementation procedure. Throughout its opinion, the Court erroneously termed the procedure as novel, a break with the Commission's past practices, and unfair.

In making these observations, the Court apparently ignored another important aspect of Section 204. The last sentence of the statute expressly delegates to the Commission authority to "issue all orders necessary to enforce the requirements of this subsection." 49 U.S.C. § 10731(e). Nowhere in the Court's opinion is any consideration given to this broad grant of discretionary authority. A two-stage implementation of rate increases has been practiced by the Commission for many years. Territorial increases in general revenue cases have traditionally been followed by individual rate initiatives by carriers and complaints by shippers to rectify inequities caused by the territorial adjustment.[5] The Commission explained in its July 20, 1983 order that this kind of procedure is precisely what it had envisioned from the beginning. App. 44a - 45a.

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[5]All general increases approved by the Commission to improve carrier revenue were conditioned on the ability of shippers to contest the application of such increases to their individual rates in subsequent complaint proceedings. *See, e.g., Increased Freight Rates and Charges, 1972,* 341 ICC 290, 331-332 (1972); *Increased Freight Rates and Charges, 1975,* 349 ICC 555, 583 (1975). The Court of Appeals for the District of Columbia recognized this procedure and commented on it in *NARI I* (585 F.2d at 525-526), and the Supreme Court dealt with the long standing two stage procedure of territorial rate in-

As Judge Starr pointed out in his dissent (App. 19a), review of agency actions in cases such as this should be limited to determine whether the action is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2783 (1984). The Court of Appeals may not substitute its judgment for that of the agency). This principle is particularly applicable here where there is an express grant of broad discretionary power to the Commission.

The plain fact is that there are literally thousands of movements of recyclable aluminum products still moving at rates far above the Commission's mandated maximum rate ceiling. After over twelve years of legislative and legal battles, these shippers are back on square one. They cannot file complaints to reduce their rates to the maximum level prescribed by the Commission,[6] and they cannot recover excess charges which the railroads have been collecting for the past five and one-half years. In the meantime, the railroads are free to increase recyclable rates under the procedures authorized by the Staggers Act and substantial increases have been applied on all recyclable rates, both below and above the maximum rate ceilings.

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creases followed by specific rate complaints at length in *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 310-16; 95 S. Ct. 2336, 2351-2353 (1975).

[6]The railroads argued strenuously in the Court below that shippers can file complaints under Section 11701 of the Interstate Commerce Act. 49 U.S.C. § 11701. Such complaints, however, would be subject to the market dominance provisions of Section 10709, which now prohibit complaints unless the rates exceed 180% of variable cost. Thus, there is no way disadvantaged shippers can now ever achieve the Congressional objective of reasonable rate levels for recyclables which the Commission has set at ratios varying between 143% and 155%.

2. The Petition for Review Should Have Been Dismissed Under the Time Limitation of the Hobbs Act

The Interstate Commerce Commission, The Aluminum Association, and the National Association of Recycling Industries all contended that the petition for review in *NARI VI* was barred by the sixty-day limitation of the Hobbs Act. 28 U.S.C. § 2344. In *NARI VI,* the complaint procedure authorized by the Commission in its October 13, 1981 order was struck down even though the petition for review of that issue was not filed until 1983. Moreover, the 1981 order had already been reviewed on a different issue and affirmed by the Court of Appeals in 1982. *NARI IV.* The majority of the court held that the sixty-day limitation of the Hobbs Act was not applicable thereby creating a new exception to the sixty-day time limit which has heretofore been consistently and strictly enforced by the Supreme Court and the Courts of Appeals.

Judicial review of orders of the Interstate Commerce Commission came under the provisions of the Hobbs Act in 1975. The purpose of the 1975 amendment was to simplify the review process and to impose a time limit of sixty days within which to appeal ICC decisions. The importance of the sixty-day limitation has been emphasized many times. *Natural Resources Defense Council v. Nuclear Regulatory Commission,* 666 F.2d 595 (D.C. Cir. 1981); *Chem-Haulers, Inc. v. United States,* 536 F.2d 610, 613-14 (5th Cir. 1976). Efforts to enlarge the time by procedural ploys, such as filing a petition for reconsideration or modification after expiration of the time limits have ail been firmly rejected as a means of extending the sixty-day period. *National Bank of Davis v. Office of Comptroller of Currency,* 725 F.2d 1390 (D.C. Cir., 1984). A similar tactic was employed here where the railroads filed a Peti-

tion for Clarification or Declaratory Order requesting the Commission to abandon its two-stage implementation procedure and prohibit the filing of individual complaints over a year and a half after the sixty-day review period for the October 13, 1981 order expired.

Until *NARI VI,* Courts of Appeals have emphasized strict adherence to the sixty-day time limit as necessary to achieve administrative finality in order to implement agency policy efficiently. The action of the majority of the Court of Appeals in *NARI VI,* permitting an issue to be raised in appellate review some two years after final agency action, makes it virtually impossible for persons affected by an agency decision to rely on it unless all aspects of the decision have been expressly reviewed and affirmed.

The majority held that the validity of the two-stage procedure authorized by the Commission was not ripe for review in 1981. The Court's reasoning is as follows:

> As of October 1981, no complaints had been filed by shippers seeking individual rate reductions, no orders had been entered requiring the making of such reductions, and there was no indication whether the Commission would order such reductions if they were requested. Accordingly, it seems quite likely that in 1981 a petition to review a single unclear sentence would have been dismissed as unripe. App. 10a - 11a.

The ruling of the Court of Appeals leaves shippers in a quandary. Clearly, no one could have filed any complaint until after the Commission's order was issued in 1981 after remand from *NARI III.* After all, the previous Commission order had said that the railroads were *not* required to reduce their rates. Since no complaints were on file, it is obvious no orders could have been issued, and since the railroads appealed the October 13, 1981 order, it is quite

obvious that no complaints were going to be filed until after disposition of that appeal. After the Commission's order was affirmed, numerous complaints were filed. Some of the cases have been concluded by the Commission and most of the others have progressed beyond the initial decision stage. As of October, 1981, however, it was clearly impossible to meet the majority's standard of ripeness for review under the Hobbs Act.

Apparently, it is the lower court's position that the railroads must be allowed judicial review of the issue of the two-stage implementation of the mandated rate reductions at any time. The railroads' petition for review was not filed until late in 1983, long after complaints had been filed and Commission orders in many cases had been issued. The Court, however, made no suggestion that the railroads had any duty to bring the issue up when it became clear, under the Court's theory, that such complaints were being considered by the Commission. The railroads appear to enjoy the enviable position of being able to force shippers to go through the expensive, time-consuming litigation authorized by the Interstate Commerce Commission and, if the results were unfavorable to the railroads, simply file a Petition for "clarification" or for "declaratory order," thus bringing the 1981 issue back to life and subject to review. This concept is startling and has implications far beyond the boundaries of this case. It seriously weakens the doctrine of administrative finality which the time limitation of the Hobbs Act was designed to promote.

The Court of Appeals also attempted to justify its decision on the basis that the 1981 decision was unclear regarding the nature of the two-stage proceeding and based on a single cryptic sentence. The passage in the 1981 order referred to by the majority court's opinion is as follows:

> As a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement. We also realize that tariff changes will be more numerous and complex if the Schedule C traffic segments are used. However, to come as close as possible to applying the average figure to individual rates, we will require reductions based on the Schedule C traffic segments. This method will best serve the purposes Congress intends to achieve with Section 204.
>
> Furthermore, should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission. App. 101a.

Indeed, this section of the Commission's order, when read in context with the rest of the order, leaves little doubt that the Commission was contemplating territorial reductions followed by specific adjustments made by shipper complaints. As noted by the dissenting judge, the Comission's explanation may not have been a model of clarity, but it is hard to read the passage quoted above as having any meaning other than that individual shipper complaints would be permitted subsequent to implementation of the territorial average reductions. App. 23a.

Moreover, in all of the Commission orders issued subsequent to October 13, 1981 the Commission has reiterated the importance of the complaint procedure to overall compliance with the mandate of Section 204 of the Staggers Act. It was referred to in the Commission's order of December 6, 1982 (App. 90a) and reaffirmed in its order of July 20, 1983 in response to the Petition for Declaratory Order filed by the railroads. There can be no doubt that from the beginning everyone was fully aware of the existence of the complaint remedy. The Court's decision

holding that the issue of individual complaints was not ripe for review constitutes a hole in the sixty-day review limitation of the Hobbs Act big enough to permit a steady stream of challenges to agency action filed years after issuance of a final agency order.

If the railroads were confused by the Commission's authorization, or thought it exceeded the statutory authority granted by the statue, the obvious remedy was to file a petition for reconsideration or a petition for review within the time limits required for such pleadings. It is wholly improper to permit the railroads to wait two years and then raise the issue after the recycling industry had conscientiously followed the procedures which had been authorized by the Commission and which had been in existence without challenge for nearly two years. Accordingly, the railroads' petition for review should have been barred by the time limitation of the Hobbs Act.

CONCLUSION

This Court should grant a writ of *certiorari* to the United States Court of Appeals for the District of Columbia for the reasons set forth hereinabove.

Respectfully submitted,

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85-2157

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE ALUMINUM ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2296

NORFOLK & WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.
ALUMINUM ASSOCIATION, INC.,
CONSOLIDATED RAIL CORPORATION,
REYNOLDS METAL COMPANY,
FORT HOWARD PAPER COMPANY, INTERVENORS

Petition for Review of an Order of the
Interstate Commerce Commission

Argued November 6, 1984

Decided July 19, 1985

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Michael Boudin, with whom *Eugene D. Gulland*, *J. Michael Hemmer*, *Michael P. Richman*, *Howard D. Koontz*, *Richard W. Kienle*, *Stuart E. Vaughn*, *Richard Weicher*, *Shirley A. Brantingham*, *John Paylor*, *Albert B. Russ, Jr.*, and *James L. Howe, III* were on the brief, for petitioners. *Harry N. Babcock* and *W. Donald Boe, Jr.* entered appearances for petitioners.

Craig M. Keats, Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, Interstate Commerce Commission, *J. Paul McGrath*, Assistant Attorney General, Department of Justice, *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, *John J. Powers, III* and *John P. Fonte*, Attorneys, Department of Justice were on the brief, for respondents.

Edward L. Merrigan, for intervenor National Association of Recycling Industries, Inc.

William L. Slover, *C. Michael Loftus* and *John H. LeSeur* were on the brief, for intervenor Fort Howard Paper Company.

Dickson R. Loos, for intervenor Aluminum Association, Inc. *Craig Goodrich* entered an appearance for intervenor.

John A. Daily was on intervenor Consolidated Rail Corporation's letter supporting petitioners.

Before: GINSBURG, BORK and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BORK.

Dissenting opinion filed by *Circuit Judge* STARR.

BORK, *Circuit Judge*: Thirty-six railroads petition for review of an Interstate Commerce Commission order. The Commission decided that shippers may seek reductions and refunds of certain individual rail freight rates for recyclable products. In *National Association of Re-*

cycling Industries, Inc. v. *ICC*, 660 F.2d 795 (D.C. Cir. 1981) (*"NARI III"*), this court approved a territorial average basis for calculating refunds and reduced rates for recyclables under section 204(e) of the Staggers Rail Act of 1980, 49 U.S.C. § 10731(e) (1982). The Commission has now moved beyond *NARI III* and has adopted a new method for determining rail freight rates for recyclables that will require petitioners to reduce further their current rates and to pay additional refunds. Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, decision served July 20, 1983 (*"1983 Decision"*). Because this new method is inconsistent with our interpretation of section 204(e), we reverse the decision of the Commission.

I.

This case is the latest of a series involving the ICC's efforts to deal with railroad rates for recyclable products. Concern for the environment caused Congress to direct the Commission to determine whether the railroad rate structure discriminated unreasonably against recyclable products. The Commission investigated and concluded that recyclables were being treated fairly. This decision was set aside because the Commission did not adequately explain whether the rate disparities between recycled and virgin commodities were justified. *National Association of Recycling Industries, Inc.* v. *ICC*, 585 F.2d 522 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 929 (1979) (*"NARI I"*). The Commission conducted an additional investigation and concluded that the standard for maximum reasonable rates on recyclables should be set at 180% of variable costs.[1] This decision also was set aside

[1] Throughout this opinion, various ratios are mentioned in conjunction with the setting of rates for shipping recyclables. These ratios are expressed as a percentage of the variable costs of shipping recyclables and represent the level of reve-

because of an absence of evidentiary support for the standard and because of the absence of an explanation for the ratio which the Commission had selected. *National Association of Recycling Industries, Inc.* v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980) ("*NARI II*"), *modified sub nom. Consolidated Rail Corp.* v. *National Association of Recycling Industries, Inc.*, 449 U.S. 609 (1981).

Shortly after *NARI II* was decided, Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"). Section 204(e) of the Staggers Act instructed the Commission to reduce rail rates for recyclables to levels no higher than required to maintain adequate railroad revenues and preserve an economically sound transportation system. Disagreement soon developed, however, because of a seeming contradiction between the first and second sentences of section 204(e).[2] The first sentence appeared to contemplate im-

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nues a railroad must earn to recover both the direct or variable costs of moving recyclables and also such fixed costs as overhead, plus a reasonable rate of return.

[2] The full text of § 204(e) reads as follows:

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail Act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the

mediate rate reductions for recyclables "within 90 days after the effective date" of the statute. The second sentence, however, contemplated the continuation of some rates above the statutory ratio.

In its initial decision construing section 204(e), the Commission relied on the second sentence of the statute and declined to order the railroads immediately to reduce rates on recyclables. Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, 364 I.C.C. 425, 426 (1980) (*"1980 Decision"*). The Commission thought Congress had not intended to require immediate rate reductions and that so long as the excessive rates were not further increased, inflation (by steadily increasing variable costs) would bring rates down to the statutory ratio. The Commission also concluded that the statutory ratio should be set initially at 146% of variable costs. At this level, the Commission believed the railroads would earn enough money to cover both their variable costs in moving recyclables and their fixed costs such as general overhead, plus a reasonable return on investment.

The National Association of Recycling Industries appealed the Commission's *1980 Decision*, and once again we reversed the Commission. *National Association of Recycling Industries, Inc.* v. *ICC*, 660 F.2d 795 (D.C. Cir. 1981) (*"NARI III"*). We held that the Commission had failed to give adequate weight to the first sentence of section 204(e) which requires immediate rate reductions. The court reconciled the apparent conflict between the first and second sentences of section 204(e) by conclud-

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United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.

49 U.S.C. § 10731(e).

ing that the statute contemplates rate reductions on the basis of territorial averages.[3] Accordingly, we held that individual rates could either exceed or fall below the 146% level so long as territorial average rates equaled 146%. The opinion noted that historically the Commission had ordered rate reductions on a territorial average basis and concluded that so long as individual rates exceeding 146% were not further increased, inflation would eventually bring *all* rates down to the statutorily required level. *NARI III* therefore endorsed territorial averaging as the preferred method for achieving rate reductions because only that method was consistent with the conflicting demands of the first and second sentences of section 204(e).

On remand, the Commission adopted the territorial average rate reduction methodology and ordered the railroads to pay refunds for past overcharges. Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, 365 I.C.C. 304 (1981), *modified*, order served Nov. 27, 1981, *aff'd sub nom. Baltimore & O.R.R.* v. *ICC*, No. 82-1066 (D.C. Cir. June 9, 1982) (unpublished)

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[3] The distinction between territorial average rate reductions and individual rate reductions is crucial to this case. There are millions of separate movements of recyclable commodities in the United States with separate rates for each commodity moving between each pair of locations. Under a system of individualized rate reductions, it is necessary to identify for each rate the directly variable costs of transporting each commodity between each pair of locations and then to compute separately a new rate for each movement. Under a system of territorial average rate reductions, the country is divided into three territories, East, South, and West. Rates are then adjusted to account only for the movements of commodities within each territory and from any one of the territories to another. Accordingly, under the territorial average method many fewer computations are made, and less precise adjustments are possible. This disadvantage is more than compensated for, however, by gains in administrability.

(*"1981 Decision"*). The Commission rejected use of an individual rate reduction methodology—*i.e.*, reduction of each individual rate above the 146% ratio—because "[a]s a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement." *1981 Decision*, 365 I.C.C. at 307. In a single cryptic sentence, the Commission also stated that "should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission." *Id.* This statement was not elaborated upon, did not concern an issue that had been briefed or argued, and was clearly not necessary to the result of the *1981 Decision*.[4]

All of the petitioners complied with the *1981 Decision* by making rate reductions and paying refunds pursuant to the territorial average rate reduction method. Although the Commission did not specifically state that it was requiring use of this method for payment of refunds, it is impossible to read the *1981 Decision* as endorsing any other conclusion. In subsequent opinions released in 1982 and 1983, the Commission noted that the railroads were in full compliance with the *1981 Decision*. Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, decision served Dec. 6, 1982 (unpublished); Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, decision served May 20, 1983 (unpublished). Subsequently, however, several shippers demanded reduction of certain individual rates remaining above the 146% ratio, even though territorial *average* rates were already at the 146% level.

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[4] The railroads sought review of the *1981 Decision*, and we affirmed in an unpublished order. Baltimore & O.R.R. v. ICC, No. 82-1066, mem. op. (D.C. Cir. June 9, 1982) (unpublished) (*"NARI IV"*). A subsequent decision on the different problem of terms for cancelling joint rates was also handed down by this court in National Ass'n of Recycling Industries, Inc. v. ICC, 704 F.2d 638 (D.C. Cir. 1983) (per curiam) (*"NARI V"*).

The railroads petitioned the Commission for a declaratory order clarifying their obligations under section 204(e). The railroads claimed that under *NARI III* and the *1981 Decision* individual rate reductions were not required by the statute so long as territorial average rate reductions had been made. The railroads also claimed that they would be deprived of adequate revenues if they further reduced some individual rates at a time when territorial average rates were already at or below 146%. Finally, the railroads claimed that further individual refunds, in addition to the territorial average refunds already paid, would force the railroads to pay refunds twice.

On July 20, 1983, the Commission issued the decision now under review. Ex parte No. 394, *Cost Ratio for Recyclables—1980 Determination*, decision served July 20, 1983 (*"1983 Decision"*). The Commission concluded that the railroads' present rates "comply with our earlier Ex Parte No. 394 orders and in the aggregate are at or below the 146-percent level." *Id.* at 5. Notwithstanding this compliance, the Commission stated that it would entertain complaint cases against individual rates that remained above the 146% level and would now require further rate reductions and refunds on an individual rate basis. The Commission concluded that this construction was permissible under *NARI III* because it saw

> no indication whatsoever that the court's construction would preclude later individual adjustments with respect to rates that have been detected as being above (or below) the cap. The purpose of the averaging approach was simply to establish initial overall compliance. From the start, we contemplated individual adjustments in both directions that would maintain the overall level of compliance and in fact result in individual rates gravitating closer and closer to the 146-percent level.

Id. at 12.

The Commission also concluded that the railroads' alleged double refund problem was of their own making, because all railroads knew about the availability of individual complaints from the start. Nonetheless, to mitigate the problem, the Commission offered to permit the railroads to offset "windfall" refunds paid to particular shippers (under the territorial average method) against any further future refunds sought by those same particular shippers under the individual rate method. This concession reduces but does not eliminate the double refund problem because there is no guarantee that the new refunds will always be sought by the same shippers who also benefitted under the territorial average approach. The railroads claim the problem is severe since they have already "distributed millions of dollars in refunds under the *1981 Decision*." Brief of the Petitioning Railroads at 28.

II.

This petition presents two issues for review. First, the Commission maintains that the legal question now before us was actually presented, litigated, and decided at the time of the *1981 Decision*. The Commission therefore insists that the railroads' present challenge is barred by the Hobbs Act and principles of *res judicata*. Second, in response to petitioners' claim that it acted arbitrarily and capriciously in ordering the railroads to reduce rates and pay refunds *twice* under section 204(e), the Commission contends that its current interpretation of the statute is both permissible and fully consistent with our construction of that section in *NARI III*.

A.

This petition is not barred by the jurisdictional provisions of the Hobbs Act or by principles of *res judicata*.

In the proceedings that led up to the *1981 Decision*, no one ever raised the question of whether shippers

could obtain *both* territorial average rate reductions *and* a second round of reductions and refunds on an individual rate basis. The pleadings that led up to the *1981 Decision* make no mention of this issue, and the Commission failed to mention the matter when it summarized the questions it was deciding at the beginning of its decision. 365 I.C.C. at 305. The question presented now was not argued to the Commission at the time of its *1981 Decision*.

There can also be no doubt that in 1981 the Commission did not decide the question now presented. The Commission's argument that it did rests on a single, cryptic sentence in the *1981 Decision* indicating that the Commission did not intend to preclude the filing of complaints addressed to individual rates. This sentence gave no indication as to what action might be taken on individual shipper complaints, the sentence was not implemented by any ordering paragraph, and it was not necessary to the result. Indeed, the sentence appears to have been added almost as an afterthought.

Our belief that the question now before us was not decided in 1981 (and can therefore be raised now) is strengthened by our conviction that that question would not have been ripe for review in 1981.[5] As of October 1981, no complaints had been filed by shippers seeking individual rate reductions, no orders had been entered

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[5] In Eagle-Picher Industries, Inc. v. EPA, 759 F.2d 905 (D.C. Cir. 1985), this court held that it will not conduct a "retrospective ripeness analysis" after the expiration of a statutory review period when a petitioner claims that a late filing is reviewable because the challenge it raises has only recently become ripe. *Id.* at 909. However, because the court in *Eagle-Picher* was articulating this rule "for the first time," the panel proceeded to conduct the retrospective ripeness analysis in that case. *Id.* at 909, 915-19. Since *Norfolk & Western* was briefed and argued before the decision in *Eagle-Picher* was issued, we must conduct a similar analysis here

requiring the making of such reductions, and there was no indication whether the Commission would order such reductions if they were requested. Accordingly, it seems quite likely that in 1981 a petition to review a single, unclear sentence would have been dismissed as unripe. *See, e.g., Baltimore Gas & Electric Co.* v. *ICC*, 672 F.2d 146 (D.C. Cir. 1982). Since the Commission barely concedes that the issue of future Commission refunds is ripe even now, *see* Joint Brief for the ICC and USA at 33 n.29, it is difficult to see how it could have been ripe at the time of the *1981 Decision.*

It follows that the present petition for review is not barred by the jurisdictional deadlines of the Hobbs Act or by principles of *res judicata.* The Act requires that petitions for review of ICC orders be filed within sixty days after their entry or after the denial of rehearing. 28 U.S.C. § 2344 (1982). Since the issue presented was not resolved until the *1983 Decision* and petitioners filed a timely appeal from that decision, the jurisdictional provisions of the Hobbs Act have been satisfied.

We also see no merit to the Commission's invocation of either the claim preclusion or the issue preclusion aspects of the doctrine of *res judicata.* Claim preclusion has at most limited application to ongoing rate orders. As the Supreme Court has noted, rate orders are *generally* not *res judicata* because "[e]very rate order made may be superseded by another." *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, 445 (1930) (Brandeis, J.); *see also United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-22 (1966). In any event, the *1981 Decision* did not resolve the same claim as the one now advanced. Issue preclusion applies only to issues that were actually litigated, as well as decided, *see, e.g., United States* v. *International Building Co.*, 345 U.S. 502, 504-05 (1953) (Douglas, J.); *Association of Bituminous Contractors, Inc.* v. *Andrus*, 581 F.2d 853, 860 (D.C. Cir. 1978), and only to issues whose resolution was necessary to the judgment.

Restatement (Second) of Judgments § 27 comment h (1982). The individual complaint issue was not litigated prior to the *1981 Decision*, and the resolution of that issue was not necessary to the decision.

Finally, the Commission objects that judicial review of this case is barred because petitioners have not satisfied the requirements which must be met prior to reopening of a final agency decision. 49 U.S.C. § 10327(g) (1982). But since the *1981 Decision* did not decide the issue decided in the *1983 Decision*, there was no occasion for petitioners to resort to the statutory reopening procedures with respect to the former.

B.

Turning to the merits, several factors cause us to favor the construction of section 204(e) advanced by petitioners. First, as we indicated in *NARI III*, it is generally desirable in construing statutes to give effect " 'if possible, to every word, clause and sentence of [the] statute' so that no part will be inoperative or superfluous, void or insignificant." *NARI III*, 660 F.2d at 799, *quoting In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980). Petitioners' reading of section 204(e) ascribes a purpose to both the first and second sentences. The first sentence requires the immediate reduction of recyclable rates until territorial average rates are equal to or less than the statutory ratio. The second sentence, in turn, provides that individual rates that still exceed the average may not be further increased until inflation has brought them down to the statutorily prescribed level.

This interpretation explains why section 204(e) requires immediate rate reductions, while nevertheless contemplating the existence of rates that exceed the statutory level and may not be further increased. The Commission's reading on the other hand ascribes no purpose to the second sentence, since it implies that individual

rates that exceed the statutory ratio, even temporarily, must necessarily be illegitimate.[6] Under the Commission's reading, it is difficult to understand why Congress allowed any rates to remain above the 146% level or why Congress believed it was necessary to prohibit further increases of rates that were already excessive. Under petitioners' theory, however, the purpose of the second sentence becomes clear: it ensures that inflation will eventually reduce all individual rates to the statutory level, even as the first sentence ensured an immediate reduction of territorial average rates to the 146% ratio.

This reading of section 204(e) is also more consistent with the interpretation adopted in *NARI III*. As explained there, the dissonance between the two sentences of section 204(e) is eliminated when one remembers that both the Commission and Congress have always appeared to contemplate territorial averaging when they have ordered rate reductions on recyclables in the past.[7]

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[6] The dissent suggests, as an alternate construction, that the second sentence might serve the purpose of presenting the Commission with "several options as to how to achieve Congress' goal." Dissent at 3. Under this interpretation, the second sentence prohibits increases in the above-average rates *if* the Commission chooses to use territorial averaging, but does not compel that choice. While this is not an implausible reading of the statute, it does not lead us to conclude that the *1983 Decision* was justified. While the Commission may have been authorized to choose to order refunds on *either* an average *or* an individual basis, it was not authorized to order *both* in such a way as to compel an unreasonable subsidization of recyclables. *See infra* note 8.

[7] The relevant portion of our discussion in *NARI III* reads as follows:

> The first sentence of Section 204(e) is clear, explicit and mandatory. It requires all rail carriers, within 90 days after the effective date of the Act, to "take all actions necessary to reduce and thereafter maintain rates . . . at revenue-to-variable cost ratio levels that are equal to or

Territorial averaging was contemplated by the Commission in both *NARI I* and *NARI II*, which set an average revenue-to-variable cost ratio of 180%. Similarly, the Senate Report to section 204(e) contemplated the continued use of the Commission's territorial average method when it explained that the purpose of the new section was to reduce "the Commission's cap on recyclables from the 180 percent revenue/variable cost ratio level to the [new] ratio level established by [the statute]." S. Rep. No. 470, 96th Cong., 1st Sess. 34 (1979). *See NARI III*, 660 F.2d at 800 (quoting Senate language). We recognized in *NARI III* that territorial averaging has always been used in ordering rate reductions for recyclables, and we concluded that, in light of that historical practice, the first two sentences of section 204(e) were readily reconciled. *NARI III*, 660 F.2d at 799. Our conclusion in *NARI III* is very similar to the construction of section 204(e) urged on us by petitioners, and indeed we believe petitioners have given *NARI III* its ordinary reading.

Nonetheless, the Commission objects that its notion of two-stage implementation and of individual rates gravitating closer and closer to the 146% level is not precluded by *NARI III*. We agree with the Commission that *NARI III* does not specifically preclude this construction. Nonetheless, we believe that the most plausible reading of *NARI III* is that it endorsed territorial averaging as it had been practiced up to that time in

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less than . . ." the average ratio of 146% established by the Commission. If the Commission had so ordered and followed its past practice of requiring rate reductions to be averaged by commodity and/or geographic area, as suggested by the dissenting commissioners, the second sentence becomes equally clear and explicit. Simply stated, it merely prevents any single rate that "equals or exceeds" 146% to be increased until it has gone below that level.

660 F.2d at 799 (footnotes omitted).

NARI I and *NARI II*. We see no reason to believe that the *NARI III* court envisioned the novel method of second stage individual rate reductions subsequently devised by the Commission.

In truth, this new method of combined territorial average and individual rate reductions represents a break with the Commission's practice as described in *NARI III* and the *1981 Decision*. The unfairness of this break is patent. In the two decisions mentioned, the railroads were instructed that territorial average rate reductions and refunds were an acceptable method for complying fully with the requirements of section 204(e). In reliance on those decisions, petitioners distributed millions of dollars of refunds and adjusted their rates until they achieved full compliance with the 146% ratio on a territorial average basis. Now, however, the Commission is no longer satisfied with this initial interpretation of section 204(e). Instead, it proposes a new interpretation which will require the railroads to pay at least some double refunds.

Were we to accept the Commission's conclusion that section 204(e) allows individualized rate reductions, we believe we would also have to conclude that the section's revenue adequacy requirement [8] mandated individualized

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[8] Section 204(e) contains a requirement that rail carriers of recyclables be allowed a sufficient return "in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States." 49 U.S.C. § 10731(e). Accordingly, all parties agree § 204(e) forbids the subsidization of recyclables as surely as it prohibits discrimination against them. Therefore, if individualized assessments were to be made, it would be as necessary to guard against subsidization as against discrimination. Fortunately,

assessment, in those cases, of the revenue-to-variable cost ratio.[9] Because nothing in the language or legislative history of section 204(e) suggests that Congress intended to create such a complicated system of individualized assessments, we believe it more likely that Congress intended the Commission to follow its traditional practice. Congress legislated against a backdrop of understood practice in this case, and it would be surprising if a

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such costly case-by-case assessments can be avoided through the use of territorial averaging.

We believe the dissent understates the matter when it suggests that revenue adequacy is "at most a secondary consideration." Dissent at 7. In its report on this bill, the Senate Committee made clear that the provisions of § 204(e) were to be enforced so as to ensure that railroads were not in any way penalized. It noted that "neither the railroads nor any other traffic will be 'subsidizing' recyclables. This traffic will be paying its full way—including all costs, plus a reasonable rate of return to the railroads. It is the Committee's intent that the railroads be afforded their full cost plus a reasonable return on the movement of recyclables . . . ." S. Rep. No. 470, *supra*, at 34.

Petitioners raise serious charges that the *1983 Decision* will lead to violations of the revenue adequacy requirement of § 204(e). Petitioners note that they have already reduced their rates to the 146% level as computed on a territorial average basis. If further individual rate reductions were now ordered, the industry average could fall below the 146% level thereby denying rail carriers adequate revenue in violation of the explicit command of section 204(e). It is no answer to this charge for the Commission to assert that rail carriers will be able to balance individualized rate reductions with individualized increases, since market pressures may prevent the necessary increases from being realized. In that situation, rail carriers would wrongly be forced to subsidize recyclables overall by reducing rates for recyclables on the most profitable routes.

[9] The revenue-to-variable cost ratio, which the Commission has set as 146%, is itself an average figure which does not accurately reflect the true cost of shipping recyclables in all individual cases.

significant departure from that practice was intended but was nowhere discussed.

We are aware, of course, that the Commission believes that its *1981 Decision* contemplated the use of both territorial average and individualized rate reductions. We do not believe, however, that petitioners were fairly put on notice of this by the single cryptic sentence on which the Commission so heavily relies. Anyone reading the *1981 Decision* in light of *NARI III* is left with the clear impression that he will have satisfied the requirements of the law by paying refunds (and making rate reductions) on a territorial average basis. If the Commission intended to convey some other meaning, it should have relayed its instructions more clearly and in greater detail. The Commission has known for several years that the railroads were attempting to comply with section 204(e) according to the territorial average method. It is now very late in the day for the Commission to decide that that method is inadequate.

In the present case, petitioners have fully complied with the prior holdings in *NARI III* and in the *1981 Decision* as they would be commonly understood. Under these circumstances, it is appropriate that we should hesitate before adopting any new construction of section 204(e) that will impose large new burdens on petitioners. The railroads have legitimately relied on a construction of the statute that we think the most plausible. Accordingly, we reverse the Commission's *1983 Decision* to the extent that it authorizes reductions or refunds with respect to rates already in compliance with section 204(e) on a territorial average basis.

It is so ordered.

STARR, *Circuit Judge*, dissenting: I respectfully dissent. In my view, the Commission reasonably decided that the best way to implement congressional intent, as embodied in section 204(e) of the Staggers Act, was to allow for individual complaints by shippers and refunds for charges that exceeded the 146% average level. The agency's interpretation, moreover, contradicts neither the Staggers Act nor any court decision, while at the same time fully effectuating Congress' clear intent. For that reason, I would uphold the order in question here.

The object of the recyclables portion of the Staggers Act was, of course, to "insure reasonable and nondiscriminatory rate levels on [recyclable] commodities by statutory proscription." S. REP. No. 470, 96th Cong., 1st Sess. 34 (1979). This court in *NARI III* held that Congress' intent in this respect could be satisfied if the ICC required the railroads to have average rates of 146% of variable costs. But Congress' goal would obviously be better achieved under the ICC's approach than under *NARI III*'s minimal standards. If only average rates are used, then railroads could lawfully charge many shippers rates for recyclables far above the 146% level; this of course constitutes a clear disincentive to the rail shipment of recyclables subject to such high rates. On the other hand, if individual complaints are permitted, then no recyclable materials would be shipped at a rate higher than 146% of variable costs, at least not without the potential for resort to the Commission for a fully efficacious remedy. Admittedly, this regime, as contemplated by the Commission, will result in the railroads' receiving less than 146% of variable costs for their total shipments of recyclables; however, as this court stated in *NARRI III*:

> While it is true that [the Staggers Act's] overall purpose is to provide the opportunity for railroads to obtain adequate earnings, it is equally true that section 204 requires the Commission to enforce its

> requirement "notwithstanding any other provision of this title or any other law . . . ." Congress deliberately chose to single out recyclable or recycled materials, other than iron or steel, for special treatment and thereby created a specific exemption from the general purposes of the Act.

660 F.2d at 799. What is equally important, section 204(e) does not prohibit rates below the 146% level; to the contrary, the provision states that the rates shall be "equal to *or less than*" the 146% level. Thus, the prime concern of section 204(e) is to provide incentives for increased recycling; the ICC's approach reasonably achieves that goal, in a manner superior to a pure average-rate approach.

Indeed, I think even the railroads would admit that Congress did not appear to have an intent as to whether only average rates, or some other rate methodology, should be employed. Under elementary principles, adequately obvious so as to require little elaboration, when Congress does not express an intent, the court's sole duty is to determine whether the agency's action in the context of its mission is reasonable; if so, then the agency's view must be upheld. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2783 (1984).

The Commission's approach, moreover, would scarcely sound any financial-havoc alarm for the railroads. One of their own number, Conrail, has taken steps on its own initiative which achieves that which the ICC's order invalidated here today would have accomplished. That is to say, if the railroads rued the notion of operating under an ICC-mandated regime of average rates plus individualized reductions, the carriers could elect, with no interference from Washington, to set rates on an individual level, just as Conrail did. Either the Conrail method or the ICC method would better effectuate Congress' intent than the average-rate method that the court today

in effect imposes on the Commission, to the clear detriment of encouraging rail shipment of recyclables. In addition, the problem—which is concededly a real one—of the railroads actually receiving less than 146% of variable costs would likely be only of temporary duration. Once the railroads were required to pay a refund for any rate set above the 146% level, the clear incentive would be provided for the carriers, if acting rationally (as we must assume they would) to set more and more of their rates for recyclables on an individual basis; at the end of the day all railroads would likely choose to set all their rates on an individual basis, again, just as Conrail has done.

Since the court can point to nothing explicit in section 204(e) or *NARI III* to support its decision scuttling the agency's order, the court seeks to justify its ruling through inference-drawing. But with all respect, none of the inferences seem to me valid, much less decisive. First, the court states that its interpretation gives meaning to the second sentence of section 204(e), while the ICC's reading "ascribes no purpose to the second sentence." Op. at 12. However, the ICC's interpretation does give meaning to the second sentence in two respects. First, the provision has meaning if one reads section 204(e) as giving the Commission several *options* as to how to achieve Congress' goal. One of those options would be to set rates on an average basis only. If the Commission selected that option, then the second sentence of section 204(e) ensures that no increase will occur in individual rates that are equal to or above the 146% level. On the other hand, if the ICC chose the option of setting all rates individually, or setting rates on an average basis but allowing individual reductions, then the second sentence will not have to come into operation. Under this approach, the second sentence is not meaningless, but rather comes into play if the ICC chooses one of several options that are open to it. Indeed, the court's argument

against the ICC's interpretation would apply with equal force to a rule by the ICC that, in the future, all rates are to be set on an individualized basis. Yet, it is inconceivable that Congress meant to proscribe a system that assured every recyclable shipment would be at 146% of variable costs.

In addition to the foregoing, the second sentence of section 204(e) could actually come into operation under the Commission's approach. The court assumes that shippers would protest all rates above the 146% level, but it is quite possible that a shipper might not find it worth the expense and effort to protest a particular rate, or a proposed increase for that rate, even though the increase might tend to discourage the shipment of recyclables. Nonetheless, the second sentence of section 204(e) would prohibit any increase in that rate, and thus prevent an even greater barrier to the shipment of recyclables from being erected.

The court next maintains that its interpretation of section 204(e) is more faithful to *NARI III* than is the Commission's construction of the statute. But the *NARI III* court was faced with the entirely different problem that, under the agency's interpretation at that time, the ICC truly read the first sentence of section 204(e) into meaninglessness. The court was obliged to demonstrate that the first two sentences of section 204(e) could be read so as not to be in conflict and so both could have effect. Thus, the court laid out one approach, consistent with the Commission's historical practice, that the ICC could take which would give meaning to all parts of section 204(e), and at the same time effectuate Congress' intent. 660 F.2d at 799. As I read *NARI III*, the court neither stated nor implied that territorial averaging was the *only* approach which the Commission could lawfully embrace. It certainly seems to me that the *NARI III* court would never have invalidated an approach which both gives meaning to all of section 204(e)

and has the happy advantage of coming even closer to achieving Congress' goal of encouraging shipments of recyclables. Indeed, it is, as we would all agree, not the job of the courts to tell an agency how to fulfill its statutory mandate; the judicial role, properly limited, is only to insure that the method the agency chooses is not arbitrary, capricious, or inconsistent with the operative statute. That standard, in my judgment, has been satisfied here.

The court nonetheless concludes that the ICC's approach is unfair, in that the spectre of individual shipper complaints and refunds represents a sharp break with past practice and reasonable railroad industry expectations. In particular, the point is pressed that the railroads were not truly put on notice of this change in the railroads' potential refund liability. The ICC, on the other hand, strenuously argues that it did give such notice in clear, plain English. To resolve this debate, it is necessary to quote in context the crucial section of the *1981 Decision*:

> As a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement. We also realize that tariff changes will be more numerous and complex if the schedule C traffic segments are used. However, to come as close as possible to applying the average figure to individual rates, we will require reductions based on the schedule C traffic segments. This method will best serve the purposes Congress intended to achieve with section 204.
>
> Furthermore, should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission.

1981 Decision, 365 I.C.C. at 307.

In this passage, the ICC set forth its decision to allow the use of average rates, based on a certain type of data

—schedule C traffic segments. Next came the key sentence, stating that a shipper still may file individual complaints. The Commission contends that this statement sent a clear message to both the railroads and shippers that individual rates greater than the 146% level would be subject to refunds even if average rates were at the mandated 146% level. That seems to me an entirely sensible reading of the sentence. The court, however, asserts again and again that this sentence is "cryptic," in that it did not state what action would be taken on a complaint. *See* Op. at 7, 10, 17. But while the sentence may not be a model of clarity, it is hard to read the passage as having a meaning other than that ascribed to it by the ICC. The sentence does not state what will be done with a shipper's complaint, but it seems ludicrous to suggest that the Commission was inviting shippers to file complaints that would be filed away on some bureaucratic shelf or summarily dismissed. The only reason the Commission, immediately after holding that reductions would be based on average rates, would go on to state that a shipper may "file a complaint" if the shipper believes "his particular rate still exceeds the permissible level" would obviously be that the ICC was prepared to order refunds to shippers whose individual rates were above the 146% level despite the fact that the average rates in its area were at the proper level. Certainly, shippers of recyclables had no difficulty discerning the meaning of the sentence.

Regardless of all this, the railroads should not be able to seize upon this perceived ambiguity to their great advantage. The sentence was pivotal, as it followed immediately on the heels of the ICC's precise holding on how to set rates. Even if the railroads were uncertain as to exactly what the sentence meant, they surely could not have believed that it was favorable to their interests, encouraging as it did complaints to be filed against them. But rather than ask the ICC for clarification, the rail-

roads merrily went on about their business, ignoring the sentence completely for a season, and ultimately repairing to this court three years later to pronounce that they were not given fair notice. I can divine no unfairness whatever to the railroads in all this; quite to the contrary, it seems manifestly unfair to permit the railroads now to use to their considerable advantage their skillfully rising above and disregarding what seems to me a crucial, if brief, part of the *1981 Decision*. If a party, in truth, does not understand a decision, then the agency's doors are open to a request for clarification; if on the other hand, the party ignores the ambiguity laden with potential for adverse impact, then the party should have to face the music when the agency ultimately renders an interpretation that is, as here, true to the original passage.

Finally, in its process of inference-drawing, the court is of the view that the revenue adequacy requirements of section 204(e) are such that, if individualized reductions were allowed, individualized assessments of the revenue-to-variable cost ratio would be required. Op. at 15-16 & n.8. The court's view is that section 204(e) requires that railroads earn a sufficient return on recyclable shipments; thus "if individualized assessments were to be made, it would be as necessary to guard against subsidization as against discrimination." Op. at 15 n.8. But as I attempted to show previously, both section 204(e) and *NARI III* make it clear that revenue adequacy is at most a secondary consideration when it comes to the favored class of recyclables.

When all is said and done, the Commission has, at long last, come to an entirely defensible and reasonable construction of the pertinent statutory provision, an interpretation which faithfully effectuates Congress' intent. Because the will of Congress with respect to encouraging the use of recyclables, as implemented by the Commission, is subverted by today's decision, I respectfully dissent.

APPENDIX B

Service Date
JUL 20 1983

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 394

COST RATIO FOR RECYCLABLES – 1980

DETERMINATION

No. 38679

RESTRUCTURED RATES ON RECYCLABLES, O/T IRON OR STEEL SCRAP – CONRAIL

Decided: July 11, 1983

Nation's railroads found to be in overall compliance with requirement that their rates on nonferrous recyclables be at or below 146 percent of variable costs, but the Commission will continue to permit individual rate adjustments and individual complaints by shippers. Conrail jont rate cancellation approved except as to Class III carrier issues, which will be ddressed in a separate decision.

DECISION

BY THE COMMISSION:

The principal purpose of this decision is to address whether the Nation's railroads are now in compliance with the requirement that their rates on recyclables be at or below levels that return 146 percent of variable costs. This decision will also address questions about whether individual adjustments and individual complaints may be undertaken and will reconsider the lawfulness of a tariff filed by Consoldiated Rail Corporation (Conrail) cancelling its participation in joint rates on recyclables.

BACKGROUND

A. The 4R Act, NARI 1. NARI 2

Much of the recent litigation concerning recyclables arose out of Section 204 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act). Section 204 of the 4R Act required the Commission to conduct an investigation to determine whether the rate structure for rail transportation of recyclable and competing virgin natural resource materials was unjustly discriminatory or unreasonable, and, if so, to remove any such defects from the rate structure.

The Commission's order[1] finding no discrimination in the rate structure and finding unreasonably high rates only for small number of recyclable products was set aside on appeal, on the ground that it did not adequately explain whether the rate disparities between recycled and virgin commodities were justified. *National Ass'n of Recycling, Etc.* v. *ICC*, 585 F.2d 522 (D.C. Cir. 1978) (*NARI 1*). Further decisions in the Ex Parte No. 319 proceeding (361 I.C.C. 238, 641, 856) were also vacated and set aside because the reviewing court disagreed with the Commission's determinations: (1) that the guideline for maximum reasonable rates on recyclables should be set at 180 percent of variable cost and (2) that any discrimination could be remedied by means that might result in rate increases for recyclables. *National Ass'n of Recycling Industries* v. *ICC*, 627 F.2d 1328 (D.C. Cir. 1980), modified *suo nom. Consolidated Rail Corp.* v. *National Association of Recycling Industries*, 449 U.S. 609 (1981) *(NARI 2).*

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[1] Ex Parte No. 319, *Investigation of Freight Rates for the Transportation of Recyclable or Recycled Materials*, 356 I.C.C. 113 (1977).

B. The Staggers Act, Ex Parte No. 394, and Conrail

Shortly after the court's decision in *NARI 2*, Congress enacted the Staggers Rail Act of 1980. Section 204 of the Staggers Act, codified at 49 U.S.C. 10731(e), required rail carriers promptly to reduce and maintain rates on recyclables, other than scrap iron and steel, that would not exceed "the average revenue to variable cost ratio rail carriers would be required to realize . . . in order to cover total operating expenses . . . plus a reasonable . . . profit . . . ." In Ex Parte No.394, *Cost Ratio for Recyclables — 1980 Determination,* 364 I.C.C. 425 (1980), we calculated that ratio to be 146 percent. We did not identify specific rates that exceeded the cap. However, we ordered the railroads to refrain from increasing nonferrous recyclables rates when such increases would result in revenue-to-variable cost ratios greater than 146 percent. We did not order immediate reductions to the 146 percent level, reasoning that cost increases would eventually bring the ratios down to that level.

Our decision was set aside upon judicial review, *National Association of Recycling Industries* v. *ICC,* 660 F.2d 795 (D.C. Cir. 1981) (*NARI 3*). In *NARI 3,* the court disagreed with our determination that rate reductions were unnecessary because "inflation erosion" would accomplish the same result if no further increases were allowed. The court instead concluded that the plain language of 49 U.S.C 10731 required *immediate* reductions of rates exceeding the 146 percent level. *Id.* at 799.

In a September 1981 decision in Ex Parte No. 394, 365 I.C.C. 304, we ordered the railroads to reduce their rates and to pay refunds. One of the principal questions addressed in that decision was the basis upon which the required reductions should be identified. At the suggestion

of the railroads and the participating recycling interests (see 365 I.C.C. at 305), we directed carriers generally to use costs and revenue data developed for each commodity on a regional basis in a recent general increase proceeding in computing the basis for the required rate reductions.[2] We recognized that the use of aggregate revenue and cost information as suggested by the parties would result in some railroad rates below and some above the standard, but we found (365 I.C.C. at 307) that "[a]s a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement."[3] To mitigate the impact of any serious discrepancies, we authorized individual complaint proceedings by shippers and individual rate adjustments by the carriers, requiring that all such future rate adjustments be specifically cost-justified. *Ibid.*[4]

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[2]In particular, we ordered so-called "Schedule C" reductions and refunds based upon data so identified which was submitted by the railroads in Ex Parte No. 386, *Increased Freight Rates and Charges — nationwide — 1981* (not printed), served December 12, 1980 (a general rate increase proceeding). The Ex Parte No. 386 Schedule C data contained revenue-to-variable cost ratios broken between the three principal rate districts in the United States (East, West and South). Where the pertinent Schedule C ratios were above the statutory benchmark of 146 percent, the carriers were ordered to reduce the applicable rates in the aggregate and to tender appropriate refunds. We concluded that the Schedule C data came "as close as possible to applying the average figure to individual rates." 365 I.C.C. at 307.

[3]The reveiwing court in *NARI 3, supra*, 660 F.2d at 795, noted with approval the Commission's "past practice of requiring rate reductions to be averaged by commodity and/or geographic area." The court in *National Ass'n of Recycling Industries* v. *ICC*, 704 F.2d 638 (D.C. Cir. 1983) (NARI 5), declines to rule on our request that it clarify whether the use of such averages would be appropriate.

[4]The railroads unsuccessfully sought review of our order that they pay refunds (*The Baltimore & Ohio Railroad Company, et al.* v. *ICC, et al.*, Nos. 82-1066, et al., D.C. Cir. June 9, 1982) (NARI 4), but they did not challenge our determination to permit individual adjustments and individual complaints.

One such individual rate adjustment that had been initiated shortly after the *NARI 3* decision was the Conrail joint rate cancellation proposal at issue in No. 38679. The Conrail tariff, which we investigated but did not suspend, cancelled Conrail's participation in all joint rates on recyclables. It was designed to establish individual cost-based rates that would be below the prescribed 146-percent standard for all Conrail recyclables movements. We ordered Conrail's connections to adjust their rates so that their portions of the resulting combination or proportional rates would not exceed the permissible level (365 I.C.C. at 306). After reviewing the evidence presented in No. 38679 (hereinafter *Conrail*), including the protests filed by National Association of Recycling Industries (NARI) and various Class I and Class III railroads,[5] we allowed the joint rate cancellation to remain in effect. We specifically approved the cancellation (except with respect to the Class III carrier issues) because Conrail had shown that its individual rates were well within the allowable range. Indeed, Conrail's new rate structure resulted in reductions for some commodities, and increases largely for those that had been highly noncompensatory. Insofar as the cancellation affected two Class III carriers (New York Dock Railway and Brooklyn Eastern District Terminal, hereinafter NYD-BEDT), it remained in effect because the Commission divided evenly on whether or not NYD-BEDT had submitted sufficiently probative evidence to warrant relief.

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[5]Class III carriers are those with less than $10 million in annual revenues. In a nutshell, the Staggers Act's joint rate and surcharge provisions at 49 U.S.C. 10705a contain special provisions for Class III carriers. See 49 U.S.C. 10705a(1), (j), and (k). Although the Conrail cancellation was (and is) governed by 49 U.S.C. 10705(e), not 10705a, we have held that the Class III provisions are relevant in determining whether the cancellation is consistent with the public interest.

Our decision in Conrail was vacated and set aside in *NARI 5* because the reviewing court concluded that we could not have properly approved Conrail's joint rate cancellation without first having determined whether Conrail's connectors' rates are at or under the 146-percent benchmark. The court also directed that we reconsider the Class III carrier issues.

THIS DECISION

This decision, then, is intended to resolve the various issues that are still outstanding as a result of the remands in *NARI 3* and NARI 5. In particular, we will address the railroads' compliance with our several Ex Parte No. 394 orders directing them to reduce their rates to the 146 percent level. We will affirm our earlier Conrail decision approving Conrail's joint rate cancellation except insofar as it involves Class III carrier issues. We will address a petition by the railroads seeking a determination (a) that compliance can be achieved by adjusting recyclables rates so that the "average rate" conforms to the standard, and (b) that individual shipper complaints may not be filed. Finally, in a separate decision that we intend to issue within two weeks, we will address the Class III carrier issues.

A. Compliance With Ex Parte No. 394

After the remand in *NARI 3,* we initiated further proceedings and ordered the railroads to reduce their rates as the court had directed. Ex Parte No. 394, *supra,* 365 I.C.C. 304. In unprinted decisions served December 6, 1982, and May 20, 1983, we evaluated the carriers' compliance with our order that they reduce their rates based on the Schedule C data.

In our December 6 decision, which also embraced No. 38805, *Railroad Cost Recovery Increase on Recyclables,* we concluded that the railroads other than Conrail (whose compliance had been addressed separately in No. 38679) had largely complied with our rate reduction order. We noted that many of the reductions were across-the-board reductions based on Schedule C data; while some of the carriers (Union Pacific Railroad Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor; and Chesapeake and Ohio Railway Company) had departed from the Schedule C approach and computed some of the necessary reductions on an individual basis. We found that the 4.7-percent "cost recovery" general increase at issue in No. 38805 had been generally supported. Finally, we required further statements in areas in which we had been unable to determine whether compliance had been achieved. In particular, we were concerned about certain rates of UP and Milwaukee Road and about whether the rollbacks of several of the carriers had properly taken into account an earlier general increase (Ex Parte No. 375).

Our May 20, decision evaluated the further statements of the various carriers. We found UP's submission not entirely acceptable because (1) it failed to account for the Ex Parte No.375 general increase; and (2) the carrier had submitted its individualized cost data for several of its single-line "non-ferrous metal scrap" movements on an aggregate basis, which resulted in several commodities continuing to move at average rates above the 146-percent level. We found Milwaukee's individualized new rates for its single-line movements, that were specifically pegged to its Rail Form A costs and were below the 146-percent r/vc level, to be acceptable. We found that the other carriers (other than Conrail, which was already in compliance, and to some ex-

tent Chessie, which had established a new rate structure similar to Conrail's for 11 recyclable commodities) had properly identified the necessary reductions, and we ordered that those reductions be taken. We accepted Chessie's approach of flagging out of the joint rate tariffs for movements of 11 specified commodities and instead applying cost-based proportional rates for each commodity designed to return revenues slightly below 146 percent of variable costs. And finally, we concluded that the railroads overall had still not demonstrated that the local and proportional rates that became effective after Conrail's (and later Chessie's) joint rate cancellation had been properly reduced.

The May 20 decision required supplemental statements regarding three issues. First, all carriers (except Conrail) were to show that rates for through movements with Conrail and/or Chessie (the latter as to 11 commodities only) do not exceed 146 percent. Second, Chessie was directed to show that rates for joint-line traffic with Conrail, as to other than the 11 commodities, do not exceed the benchmark. And third, Union Pacific was to clarify whether the impact of the Ex Parte No. 375C increases had been adequately considered in calculating the percentage reductions for its single-line rates.

Verified statements were filed addressing these three issues. The railroads, except Conrail, submitted a joint statement responding to the first issue. Chessie and UP submitted statements directed to issues two and three, respectively. Finally, Southern Railway Company and Norfolk and Western Railway Company (SRC-N&W) submitted a joint statement primarily addressing various aspects of the rate reductions required in the May 20 decision.

1. General Compliance

The railroads contend that all of the required Ex Parte No. 394 rate reductions "have brought all carriers into complete compliance with the Ex Parte No. 394 maximum r/vc ratios on all rates over which they have control including those presently being applied in connection with traffic interchanged with Conrail and Chessie." We have reviewed their submissions and conclude that their present rates, reduced either across-the-board under the "Schedule C" approach or on an individual basis, comply with our earlier Ex Parte No. 394 orders and in the aggregate are at or below the 146-percent level.

The railroads state that their rates that apply in connection with the Conrail and/or the Chessie individual rates have also been brought into compliance as a result of the rate reductions computed under the Schedule C methodology. They point out that once Conrail and Chessie (to the extent applicable) withdrew from the joint rates previously charged for interline traffic, the connecting carriers subsequently applied existing column-commodity on similar group rates[6] for intraterritorial traffic or, "in a few" cases, new, but even lower, intraterritorial rates, when interchanging with Chessie or Conrail. Movements under those existing rates are already reflected in the Schedule C data that were presented in the Ex Parte No. 394 proceeding. Thus, the railroads argue, their portions of combination rates involving Conrail or Chessie have already

[6]The column-commodity rates are constructed principally on the basis of distance and mileage. Thus, movements of a given commodity of the same weight and the same distance within the territory covered by a particular tariff would always take the same rate even if they were moving between different points.

been reduced to reflect an aggregate r/vc ratio of 146 percent or less for each commodity.[7]

We have reviewed the railroad tariffs involved, and it appears to us that the rates that now apply in connection with Conrail and/or Chessie are the same as, or lower than, those that were already reduced under the earlier Ex Parte No. 394 orders. Thus, we agree with the railroads that all of their rates, including those that now apply in connection with Chessie and Conrail, in the aggregate are at or below the 146-percent r/vc ratio for each commodity.

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[7]The railroads note that, although the service will be the same, the new proportional rates with Conrail and Chessie will result in "terminal charges" that are slightly higher than the interchange charges that applied under the previous joint rates. They suggest that the application of these higher charges could possibly result in aggregate rates slightly above the 146-percent level.

We do not believe that the rate difference will be material or, even if it were, that it would generally result in combination rates above 146 percent of variable costs. Conrail's new rates – which average 116 percent for all commodities and which, when sampled, reflected r/vc ratios ranging from 75 to 132 percent – are so far below the 146-percent standard that only a huge distortion far beyond that involved here could result in noncompliance. Further, as noted, some of the new rates applied in connection with Chessie or Conrail are *lower* that the previous local rates. Finally (and most importantly, since Chessie's individual rates do not contain the large "cushion" that Conrail's do) we note again that the Schedule C ratios that the parties suggested we use are only averages that could not possibly ensure that every single rate is in compliance. In part for that reason, as we discuss further, *infra*, any shipper that is concerned about a particular rate may file an individual complaint and obtain relief.

We appreciate the railroads' bringing this matter to our attention, but we do not believe that the Schedule C terminal charge "distortion" resulting from Conrail's and Chessie's independent rate publications are significant enough to require either tariff changes by all railroads or disapproval of Conrail's and Chessie's independent actions.

2. Chessie System

Chessie explains that when a particular recyclable is not contained in tariff ICC BEF 4600,[8] the pre-existing rates in other tariffs (*e.g.*, TEA 2009-Series or TCFB 3001-Series consisting of scale and group rates, respectively) apply for its account to the same extent as before ICC BEF 4600 became effective. According to Chessie, the only changes made in the pre-existing rates were the required Ex Parte No. 394 reductions and any increases authorized under the Rail Carrier Cost Recovery tariffs (RCCR).

Since the pre-existing column-commodity rates on recyclables, which became the applicable rates on the Chessie portion once Conrail cancelled its joint rates, have been found to be in compliance with Ex Parte No. 394, Chessie's rates that were not broken out in its individual tariff comply with the 146-percent standard.

3. Union Pacific

UP recognizes that the impact of the Ex Parte No. 375C increases was not earlier considered in some instances in calculating the required reductions in Ex Parte No. 394 as to its single-line rates. UP has calculated the additional percentage reductions needed to offset any Ex Parte No. 375C increases. The percentage reductions by commodity include:

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[8]Chessie's tariff reflecting new joint and local proportional rates on eleven recyclable commodities.

Item	Commodity	Percentage Reduction
1.	Copper Matte	3.6
2.	Lead Matte	2.7
3.	Zinc Dross	7.1
4.	Aluminum Residue	54.1
5.	Misc. Non-ferrous Residue	38.0
6.	Brass, Bronze or Alloy Scrap	9.3
7.	Lead, Zinc or Alloy Scrap	11.0
8.	Aluminum or Alloy Scrap	14.0
9.	Textile waste or scrap	9.4

Our review indicates that UP's calculations are correct. UP states that a tariff will be published to reflect the necessary adjustments on or before July 19, 1983, except on aluminum residue.[9] Publication of the various reductions, as shown in the table above, will place UP in compliance. Individual single-line commodity reductions are broken out, where appropriate, instead of those previously included in UP's generic non-ferrous metal scrap group. In addition, the application of any Ex Parte No. 375C increases has been cancelled where such increases would have produced a ratio in excess of 146 percent.

UP explains that aluminum residue has moved only from Vancouver, WA, and Troutdale and The Dallas, OR, to

[9]SRC-N&W have suggested that the rate reductions required in the May 20 decision would prove cumbersome because of the application of subsequent RCCR general increases that are published solely to recoup demonstrated cost increases. Their point is that, construed literally, our earlier order would require them to delete various rate changes that have already become effective, apply the required reductions, and then reincorporate the deleted rate changes. They have recalculated the reductions required in the May 20 decision so they can be applied directly to rates at the current level. Their approach is acceptable because the recalculated additional reductions, when applied to the current rate level, will effectively incorporate the additional reductions required.

Trentwood, WA. UP states that it is cancelling all of its other single-line rates on aluminum residue, as they are "paper rates." UP calculated the variable costs for each of the three movements identified above, on the basis of a UP Rail Form A application for 1981, indexed to reflect a fourth-quarter 1982 level. The variable cost for each movement was then increased 46 percent to produce a rate that would comply with the 146-percent benchmark.

Although the actual Rail Form A application, i.e., input and output, was not submitted into evidence, it appears that the costs and the resulting rates were developed in an acceptable manner. In view of the absence of any effective rebuttal, and the availability of future complaints, we accept UP's showing and approve its new individual rates on aluminum residue.

B. The NARI Petition

On July 1, 1983, we received a petition from NARI asking that we order Conrail's and Chessie's connections to refile statements demonstrating compliance with the 146-percent standard on an individual basis, rather than on the basis of Schedule C averages. The basis of the petition is that Section 204 requires that all rates be in compliance and that under an aggregate approach "only half" of the actual rates would comply. NARI cites the recent court decision in *NARI 5* as support for its position. Further, although NARI does not expressly so state, we presume that it is seeking a similar order as to all movements subject to the 146-percent cap, since the same issues and the same basic principles are involved.

Conceptually, we agree with NARI that the statute applies to all recyclables movements and that, ideally, compliance should be effected and monitored on an individual,

rate-by-rate basis. We also agree with NARI that the Schedule C averages are not entirely accurate for every movement, particularly when carriers drop out of the joint-rate structure for some or all movements. Yet, as the *NARI 3* court apparently recognized, and as NARI itself must have recognized when it first asked for Schedule C reductions (see 365 I.C.C. at 305), it would be impractical to attempt to identify and cost out rates for every one of the innumerable combinations of recyclables movements that could be undertaken. That is why we agreed early on in this proceeding to pursue the basic approach that the parties on both sides suggested would be administratively feasible and would result in at least overall compliance with the 146-percent standard.

We too are not entirely satisfied that every rate is under the cap simply because the Schedule C averages are. Short of requiring all carriers to cancel joint rates and instead file individual, cost-based rates[10] as did Conrail and Chessie, however, the Schedule C aggregate approach is the only feasible methodology that has been brought to our attention. And coupled with the availability of individual complaints for any non-complying movements, the average approach will protect most shippers and will provide swift and

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[10]We do not agree that the *NARI 5* decision explicitly mandated justification of every individual rate. That issue was not argued in *NARI 5;* only the issue of whether the other railroads had complied at all, and not *how* they complied, was before the court. Further, the court's denial, without explanation, of our request for clarification of the *NARI 5* decision's brief reference to the issue suggests to us that the court reserved judgment on how compliance should be effected. Finally, we remind the parties that all railroad costing – even Rail Form A costing for individual movements – is based largley on averages and will rarely represent the actual costs for any given movement. The perfect costing that NARI envisions is not practicable.

easy relief for any traffic that continues to move above the cap.

In summary, NARI's late request to turn back the clock and change the approach that it suggested and has in fact supported throughout this proceeding cannot be granted.

C. Conrail

We reaffirm our previous *Conrail* decision approving the joint rate cancellation because all of Conrail's connections have now established that they are or will soon be in full compliance with the 146-percent standard for movements of all commodities. Thus, the only shortcoming that the *NARI 5* court identified in the *Conrail* decision has now been corrected. We commend Conrail for its foresight in actively seeking innovative ways to comply with Section 204 of the Staggers Act. We adopt our earlier discussion in *Conrail* concerning our reasons for approving Conrail's joint rate cancellation.

In its new petition NARI renews its attack on the Conrail joint rate cancellation, on the ground that Conrail's sampling techniques were inadequate. In support it cites the recent decision in *Chespeake & Ohio Ry. Co.* v. *United States,* 704 F.2d 373 (7th Cir. 1983) (*C&O*), in which the court remanded a decision approving a joint rate cancellation based largely on the inadequacy of Conrail's underlying study (which, we note, involved no sampling). *C&O*, however, is inapposite, because it involved selective large-scale cancellations, and the principal question was whether the routes closed were more or less efficient than those that were left open. The court held that Conrail's study was inadequate because it shed insufficient light on the relative efficiency of many of the affected routes.

This case, however, did not involve selective route cancellations or questions of relative efficiency. This case simply involved Conrail's attempts to achieve individual compliance with the 146-percent cap. Conrail's sampling approach covered every one of the commodities that would be subject to the new rate structure and demonstrated that no movements even approached the 146-percent cap. The issues that concerned the *C&O* court are not present in this case, and *C&O* is simply not relevant.

D. **The Railroads' Petition**

Finally, we address the railroads' petition seeking a ruling that once they have made their Schedule C reductions, they are in full compliance and individual complaints will not lie. The thrust of the petition, to which various shippers responded, is that a determination to allow indvidual complaints after the Schedule C adjustments have been taken would be inconsistent with Section 204, previous Commission and court decisions, and the Congressional goal of railroad revenue adequacy. Further, the railroads argue that permitting individual complaints for refunds after already requiring Schedule C refunds would result in "double indemnity."

The railroads' argument revolves around the language of Section 204 of the Staggers Act and the interpretation accorded it by the court in *NARI 3* and by the Commission in its earlier Ex Parte No. 394 order, 365 I.C.C. at 307. The carriers interpret Section 204 as imposing a limitation only on average rates, not on any individual rates. They assert that their view is confirmed by the *NARI 3* court's explanation of why Section 204 required immediate reductions rather than maintaining the status quo until inflation erosion brought excessive rates into compliance. And they argue that the Commission's decision permitting individual carrier adjustments and individual shipper com-

plaints did not really mean what it said, because if it had, it would have conflicted with the statute and *NARI 3*. We understand the railroads' arguments, but we disagree with their conclusions, particularly in view of their own determinations to make individual adjustments when it suits them.

1. The Statutory Language

The fundamental reason why the railroads' arguments are unpersuasive is because they are contrary to the plain language of the statute, which requires that "all rail carriers . . . shall . . . reduce and thereafter maintain [nonferrous recyclables] rates . . . at revenue-to-variable cost ratio levels that are equal to or less than" 146 percent.[11] The statute does not suggest that the railroads need only reduce

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[11]The full text of the provision reads:

> Notwithstanding any other provision of this title or any other law, within 90 days after the effective date of the Staggers Rail act of 1980, all rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title shall take all actions necessary to reduce and thereafter maintain rates for the transportation of recyclable or recycled materials, other than recyclable or recycled iron or steel, at revenue-to-variable cost ratio levels that are equal to or less than the average revenue-to-variable cost ratio that rail carriers would be required to realize, under honest, economical, and efficient management, in order to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business sufficient to attract and retain capital in amounts adequate to provide a sound transportation system in the United States. As long as any such rate equals or exceeds such average revenue-to-variable cost ratio established by the Commission, such rate shall not be required to bear any further rate increase. The Commission shall have jurisdiction to issue all orders necessary to enforce the requirements of this subsection.

and maintain *average* rates at or below the cap. To the contrary, it appears to be directed to individual rates. The averaging approach is simply an administratively practicable methodology that the parties and the Commission developed to ensure overall compliance without requiring the carriers to comb through every one of their numerous tariffs that could conceivably be involved and then apply formula costs (such as those under Rail Form A), that are still based on averages, to innumerable individual movements. But neither Congress, nor the Commission, nor the *NARI 3* court ever indicated that Section 204 contemplated *only* aggregate reductions based on Schedule C data as the method for achieving compliance.

2. The Legislative History

The legislative history of Section 204 does, as the railroads point out, suggest that under the 146 percent cap, all recyclables should "pay their own way." At the same time, however, it clearly expresses the Congress' view that the cap "will represent a maximum level of reasonableness for recyclables" and that if rates on any recyclables are above the cap, "it may be economically impossible for these materials to be marketed competitively." S. Rep. No. 96-470, 96th Cong., 1st Sess. 33-34 (1979). Like any other maximum rate order, the cap here appears to have been intended to apply to every nonferrous recyclables rate, not just to overall averages. This reading seems particularly appropriate here, given the clear Congressional concern for recyclables shippers in what is generally railroad-oriented legislation. Thus, we believe that reductions through the complaint process (which, because they would involve compliance with a maximum rate order, would not require showings of market dominance) were clearly contemplated when Section 204 was enacted.

We realize that some individual rates will always remain below the cap for competitive reasons and that individual adjustments on top of the Schedule C averaging could result in overall rates below the cap. We believe that such a result ws contemplated by Congress when it required rates at *or below* the cap.[12] Any such competitively depressed rates for movements that do not pay their own way do not result from regulatory constraints, but from natural market forces.

3. NARI 3 and Ex Pate No.394

The railroads' main argument is that allowing individual complaints would contravene the *NARI 3* court's accommodation of the two parts of Section 204. Under the court's analysis, the first part of the provision can be read as suggesting average reductions, while the second part can be read as simply disallowing increases of any individual rates that are above the average. *NARI 3*, 660 F.2d at 799.

We agree that *NARI 3* interpreted the law as possibly contemplating average reductions, with undetected individual violations being excepted from further increases.[13]

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[12]Thus, in our view, the railroads should address their arguments to Congress.

[13]But see Senator Long's somewhat different accommodation of the same two parts of Section 204, cited in our first Ex Parte No. 394 decision, 364 I.C.C. 425, 427:

> The langauge "As long as any such rate equals or exceeds such revenue-to-variable cost ratio cap established by the Commission, such rates shall not be required to bear any further rate increase" – was included in Section 204 of the 1980 Act to prevent any *rate increases* on recyclables during periods which intervene each year between the Commission's *annual* establishment of "cap" and actions taken by the railroads actually "*to reduce*" rates to the new

we see no indication whatsoever that the court's construction would preclude later individual adjustments with respect to rates that have been detected as being above (or below) the cap. The purpose of the averaging approach was simply to establish initial overall compliance. From the start, we contemplated individual adjustments in both directions that would maintain the overall level of compliance and in fact result in individual rates gravitating closer and closer to the 146-percent level. In other words, whereas under the Schedule C approach the railroads could be in compliance if one of their rates returned 175 percent and another returned 117 percent of costs, after individual adjustments, both rates would return 146 percent.

That is why we have throughout this proceeding permitted numerous complaint cases[14] to proceed and numerous individual railroad rate adjustments to be made outside of the Schedule C process. The railroads' untimely efforts to reverse this approach are without basis, particularly in

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annual "cap" level and situations where the "cap" may be reduced.

For example, I understand this year the railroads are proposing a new 5% general rate increase on recyclables before they are required by Section 204 to reduce their existing rates to the new "cap" level in early January. Under Section 204, as passed by Congress, such rate increases are prohibited because the railroads have not yet reduced rates for recyclables in excess of the new "cap" to or below the "cap" level. In other words, the railroads must by January 14, 1981, *reduce* rates on recyclables to the new "cap" level under Section 204. In the meantime, because those rates are still above the "cap" level, they cannot be increased.

[14]Because we believe that questions concerning costs for individual movements can best be addressed in individual complaint proceedings, we deny the carriers' request that all such questions be raised in the context of Ex Parte No. 394.

view of the individual adjustments taken by several railroads when it was in their interest to depart from the Schedule C approach.

REFUNDS

In a notice issued on June 15, 1983, in Ex Parte No. 394 (Sub-No. 1), *Costs Ratio for Recyclables — 1983 Determination,* we proposed an upward adjustment of the current r/vc ratio on the basis of changes in the cost of capital. In our request for comments we asked the parties to address "the time frames during which the [more current] standard, . . . if adopted, should be used as a benchmark for refunds or reparations (as of the date of the new standard becomes effective, as of the date of the filing of the railroads' petition, or some other date)."

We plan to resolve that issue expeditiously. Until we do so, however, it would be inappropriate to award refunds that might prove excessive, and which the railroads will be unable to recover, *Burlington Northern, Inc.* v. *United States,* ____ U.S. ____, 103, S. Ct. 514 (1982). We will require refunds, with interest for noncomplying movements, but we do not believe that a blanket refund order is appropriate at this time. Shippers may commence individual refund proceedings, in which we will look for guidance to the determination we will make shortly in Ex Parte No. 394 (Sub- No. 1).

Finally, although we are not here addressing individual refund questions, we believe that two comments are in order concerning the railroads' assertion that requiring Schedule C reductions while permitting individual complaint proceedings results in "double indemnity." First, although we cannot conceive of how an individual shipper could obtain double recovery for the same movement, rail-

roads will be permitted to offset a refund paid under the blanket Ex Parte No. 394 order from any refunds otherwise due to a shipper in a later complaint proceeding in order to prevent unjust enrichment. Second, as to refunds under Schedule C for movements that were already below the cap, we can only observe that the railroads have been free from the outset to take individual actions, such as the Conrail joint rate cancellation, that would mitigate any damages that would be incurred under the aggregate approach.

OTHER ISSUES

In the prior decision, we afforded NARI and other parties the opportunity to present evidence of rail noncompliance with the Ex Parte No. 394 decisions. NARI states that the alleged instances of noncompliance it set out were to be examples and that it will establish the necessary record in individual complaints. Accordingly, we need take no further action at this time on these allegations.

NARI also alleges that rates for Automobiile Shredder residue (STCC 40 192 76) exceed the statutory benchmark. Again, this is an area that can be handled on an individual basis. Indeed, NARI refers to No. 37668, *Huron Valley Steel Company* v. *Norfolk & Western Railway Company, et al.,* where this issue is being litigated.

Finally, we ordered the carriers in the prior decision to show cause why tariff ICC TEA 2008-L, Item 5750, should not be corrected and refunds made. Subsequent republications had included reductions for recyclables, but the reductions did not cover Item 5750 which affected petitioner Western Electric. According to the carriers, the appropriate changes are being made, effective on or about June 19, 1983.

We find:

1. Further reductions as set out in Appendix A are required for Union Pacific and Southern Railway Co. and Norfolk & Western Railway Co.

2. Except as stated above, the carriers' recyclable rate structures are generally in compliance with orders in Ex Parte No. 394.

3. In No. 38679, the recyclable rate structures of connecting carriers comply with Ex Parte No. 394 in regard to the Conrail cancellation.

4. The carriers' request for declaratory order and/or clarification in regard to prohibiting individual complaints under section 204 is denied.

5. The prior decision in No. 38679, 365 I.C.C. 596, except with regard to the Class III carrrier issues, is reaffirmed.

6. The Conrail cancellations are found lawful in all respects.

7. The issue of whether Automobile Shredder Residue should be included as a nonferous recyclable is not appropriate to this proceeding.

8. This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The proceeding in No. 38679 is discontinued, except as to the Class III carrier issues.

2. The reductions set out in Appendix A must be effective within 30 days from service of this decision.

3. The carriers' petition filed May 17, 1983, is denied.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

[APPENDIX A]

Reductions required to comply with Ex Parte No. 394 orders. Headings in this appendix correspond to the headings in the May 13, 1983 decision.

A. SRC Single-line Intradistrict South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.6%
119.2	Zinc Dross & Residue	3.6
119.5	Ashes	3.4
119.7	Lead, Zinc or Alloy Scrap	3.5*

B. 1 STR Interline Intradistrict South

SPC No.	Description	Additional Reduction
119.2	Zinc Dross & Residue	5.4%
119.5	Ashes	3.7
119.9	Tin Scrap	3.7

C. 2 STR Interline Interdistrict

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products (South to East)	3.7%
119.2	Zinc Dross & Residue (East to South)	3.2
119.7	Lead, Zinc or Alloy Scrap (East to South)	3.7

D. SSR Single-line Intradistrict South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.6%
119.2	Zinc Dross & Residue	3.6
119.5	Ashes	3.6
119.7	Lead, Zinc or Alloy Scrap	3.7

E. 1 N&W Single-line East

SPC No.	Description	Additional Reduction
119.2	Zinc Dross & Residue	6.5%

E. 2 N&W Single-line East

SPC No.	Description	Additional Reduction
89.1	Reclaimed Rubber	6.2%
119.2	Zinc Dross & Residue	6.6
119.6	Brass, Bronze, Copper or Alloy Scrap	3.6
119.7	Lead, Zinc or Alloy Scrap	9.1
120.1	Wood Scrap or Waste	8.6
123.0	Shipping Containers Returned Empty	7.1

E. 4 N&W Single-line South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.9%
119.2	Zinc Dross & Residue	5.6
119.5	Ashes	4.0
119.7	Lead, Zinc or Alloy Scrap	4.0

E. 4 N&W Single-line West

SPC No.	Description	Additional Reduction
89.2	Rubber or Plastic Scrap or Waste	3.3%
118.1	Blast Furnace Products	14.1
119.1	Zinc Dross & Residue	6.8
119.6	Brass, Bronze, Copper or Alloy Scrap	3.3
119.7	Lead, Zinc or Alloy Scrap	7.6
120.0	Textile	3.8
121.0	Paper Waste or Scrap	9.0

F. UP Single-line West

SPC No.	Description	Additional Reduction
119.0	Copper Matte	3.0
119.1	Lead Matte	2.7
119.2	Zinc Dross	7.1
119.4	Misc. Non-Ferrous Residue	38.0
119.6	Brass, Bronze or Alloy Scrap	9.3
119.7	Lead, Zinc or Alloy Scrap	11.0
119.8	Aluminum or Alloy Scrap	14.0

Service Date
MAY 20 1983

INTERSTATE COMMERCE COMMISSION
DECISION
Ex Parte No. 394[1]
COST RATIO FOR RECYCLABLES – 1980 DETERMINATION
No. 38679[2]
RESTRUCTURED RATES ON RECYCLABLES, O/T IRON OR STEEL SCRAP – CONRAIL
Decided: May 16, 1983

In Ex Parte No. 394, the nation's railroads were previously ordered to reduce rates on recyclables (other than scrap iron and steel) to reflect a maximum ratio of 146 percent of revenue to variable costs and, secondly, to provide refunds for the period between December 31, 1980, and the date the required lower rates were effective.[3] The prior decision in Ex Parte No. 394 (not printed), served December 6, 1982, evaluated, *inter alia,* statements submitted to demonstrate compliance with our prior orders. Because of deficiencies in the statements, we required supplemental statements from certain carriers.

In No. 38679, *Restructured Rates on Recyclables-Conrail,* 365 I.C.C. 596 (1982) (referred to here as the *Conrail*

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[1]Also embraces No. 38805, *Railroad Cost Recovery Increase on Recyclables (Other Than Iron and Steel Scrap). Since no appeal was filed with respect to the issues in No. 38805, no further discussion is necessary here.*

[2]Remanded in *National Ass'n of Recycling Industries* v. *ICC,* No. 82-1500; (D.C. Cir. decided April 5, 1983).

[3]365 I.C.C. 304 (1981), and *National Ass'n of Recycling Industries* v. *I.C.C.,* 660 F.2d 795 (D.C. Cir. 1981).

case), the Commission allowed the Consolidated Rail Corporation (Conrail) to cancel certain joint rates on recyclables and to impose new single-line local and proportional rates. Our decision in *Conrail* has been vacated and remanded for further consideration by an order of the Court of Appeals, D.C. Circuit, dated April 5, 1983 (see footnote 2). In *Conrail* we found, among other things, that Conrail's new single-line rates were in compliance with Ex Parte No. 394. We also ordered Conrail's connecting carriers to reduce their rates on movements involving Conrail so that the resulting combination rates would not exceed the 146-percent standard. The Court found no fault with the Commisison's findings concerning Conrail *per se.* It did, however, express concern that the Commission has approved Conrail's rates before we determined whether Conrail's connectors made the necessary adjustments to their factors of the resulting combination rates. Accordingly, the Court ordered the Commission to make this determination and to also reexamine issues concerning Class III carriers within 90 days from the Court's order.

The Court stated that we could complete the Ex Parte No. 394 proceeding and integrate the results into *Conrail.* (Slip op., p. 4) For administrative convenience, we will follow that approach. Accordingly, this decision: (1) evaluates the supplemental statements from all carriers submitted in response to our prior decision in Ex Parte No. 394; (2) requires additional supplemental statements from certain carriers; and (3) on an expedited basis, requires statements from connecting carriers affected by Conrail's [and, as explaiend below Chessie System Railroads' (Chessie)] cancellations. When further statements are received, we wil! issue a final decision, pursuant to the Court's order, by July 5, 1983.

I. DATA DEMONSTRATING COMPLIANCE WITH EX PARTE NO. 394

As noted above, the prior decision in Ex Parte No. 394 required certain railroads to submit supplemental evidence regarding (1) "data demonstrating compliance with Ex Parte No. 394," and/or (2) "data accounting for the X375C increase." Both the Union Pacific Railroad Company (UP) and the Chicago, Milwaukee St. Paul and Pacific Railroad Company, Debtor (Richard B. Ogilvie, Trustee) (Milwaukee) were required to submit statements with regard to western single-line rates. The additional data were requested, since the UP and Milwaukee departed from use of the X386 Schedule C data, used by the other Western carriers, in determining the percentage reduction needed to comply with the 146-percent revenue to variable cost (r/vc) benchmark ratio.

A. UP's Evidence. As requested, UP has submitted the additional data. The data reflect UP's own cost data (as opposed to X386 Schedule C data) for its recyclable single-line traffic, and are presented in the X386 Schedule C format. However, UP's approach is not enitrely satisfactory. First, the revenue/cost comparisons had a computer "run date" of March 19, 1981. Because the X375C increases were still under suspension at that time; it does not appear that UP considered the impact of any X375C increase if, in fact, it took such increases. The r/vc ratios reflect only two commodity groups with r/vc ratios exeeding 146 percent. The group representing Blast Furnace Products reflects a ratio of 253.2 percent while the group representing Bakery Refuse has an r/vc ratio of 146.1 percent. UP noted that the former required, and was accorded, a rate reduction of 42.3 percent to equal the 146-percent benchmark. This is correct, assuming no increase was taken in

X375C on this commodity. UP made no comment regarding Bakery Refuse. A reduction of ony 0.07 percent would be needed to equal the 146-percent benchmark, assuming no increase was taken in X375C. While UP may have concluded that such a reduction would be insignificant, strict compliance must be made with the statutory standard.

In addition, one other area of UP's submittal requires anlaysis. Its evidence included UP's own cost data for a commodity group labeled non-ferrous metal scrap. The composite r/vc ratio for the group was 129.7 percent, thus purportedly requiring no rate reduction. However, this group includes nine recyclable commodities or commodity subgroups for which separate r/vc ratios were set out in the X386 Schedule C data. The 129.7 percent composite ratio reflects a weighted average of UP's own r/vc ratios for the nine recyclable commodities. UP states that it took reductions on five of the nine commodities "for competitive reasons." A better perspective of this issue can be seen in Table I below. The table reflects the nine commodity groups in question, along with a comparison of (1) the percentage reductions required on UP's weighted average ratio basis, (2) the percentage reductions taken by UP "for competitive reasons," and (3) the percentage reductions required for the X386 Schedule C basis.

Table I.

Item No.	Commodity	Reduction Required UP's Weighted Average Basis	Reduction Taken by UP For Competitive Reasons	Reduction Required on X386 Sch. C Basis[a]
		(%)	(%)	(%)
1.	Copper Matte	0	22.9	2.7
2.	Lead Matte	0	4.8	2.4
3.	Zinc Dross	0	0	6.4
4.	Aluminum Residue	0	0	48.6
5.	Miscellaneous Non Ferrous Residue	0	16.9	34.1
6.	Brass, Bronze, or Alloy Scrap	0	16.4	8.4
7.	Lead, Zinc or Alloy Scrap	0	0	9.9
8.	Aluminum or Alloy Scrap	0	12.6	12.6
9.	Tin Scrap	0	0	0

[a]Reflects impact of X375 increases where appropriate.

As can be seen above, the reductions taken by UP for items 1, 2, and 6 exceed the reductions required on the X386 Schedule C basis. The reductions for items 3, 4, 5, 7 and 8 are less than or equal to the reductions required on the X386 Schedule C basis. UP's approach, accordingly, is not acceptable. Reductions must be calculated on an individual commodity basis. A recyclable rate cannot be structured in a manner that depends on transportation conditions for another commodity. It must be noted in this regard that Chessie's approach (discussed below also uses averages. However, Chessie's rate structure ensures that all movements are in compliance, because it is based on weight, mileage and car type, regardless of the com-

modity. Here, however, UP's "average" cost ratio does not result in an average rate or rate structure, but only serves as justification for not making reductions on specific commodities. In a further supplemental statement that we will require, UP may still use its individual carrier costs. However, costs must take into account the X375C increase (if any and, unless they are based on characteristics that apply to all commodities (such as Chessie's and Conrail's approach) costs must be separated by commodity.

3. Milwaukee's Evidence. Milwaukee's supplemental evidence clearly indicates that it has complied with the 146-percent maximum r/vc ratio as to its single-line rates. Milwaukee developed single-line variable costs by car type for appropriate mileage blocks and lading weights. The costs were based on a Rail Form A application for the year 1977 and updated to an October 1, 1981 level. The various costs were multiplied by 1.46, i.e., increased 46 percent. The resulting rates were subsequently published (effective December 28, 1981) as maximum single-line rates on recyclables for Milwaukee.

We have reviewed the underlying Rail Form A unit costs and find them to be acceptable. Milwukee's approach also eliminates the need to consider X375C increases. In summary, the methodology employed by Milwaukee effectively "caps" all of its single-line rates on recyclables at the 146-percent r/vc ratio benchmark. Accordingly, we conclude that Milwaukee's approach is acceptable.

II. DATA ACCOUNTING FOR THE X375C INCREASE

The prior decision required Eastern carriers (except Conrail) and Southern carriers to provide additional data showing that the impact of any increases taken in X375C

had been properly considered in calculating the percentage reductions in rates needed to comply with the 146-percent maximum r/vc ratio. The traffic segments to be addressed included East and South, single-line and joint-line rates, and interdistrict East-South and South-East rates. Norfolk and Western Railway Company (N&W) and Illinois Central Gulf Railroad Company (ICG) were also ordered to provide data pertaining to their West single-line rates.

Because Chessie's approach of complying with the standard differs, in part, from the other Eastern and Southern carriers, its situation will be discussed below under a separate heading.

A. **Eastern and Southern Carriers' Evidence (Excluding Chessie).** Separate verified statements were submitted by: (1) Southern Territory Railroads (STR), addressing interline intradistrict rates within the South and interline interdistrict rates, i.e., South to East and East to South (2) Seaboard System Railroad, Inc. (SSR), addressing single-line rates intradistrict South; (3) Southern Railway Company (SRC), addressing single-line rates intradistrict South; (4) ICG, addressing single-line rates, intradistrict South and intradistrict West; and (5) N&W, addressing single-line rates intradistrict West, as well as interline intradistrict rates within the East.

STR and SRC contend that the X375C increases were adequately considered and that their previously calculated reductions under X394 were proper. These parties explain that, in May of 1981, the X375C increases were either removed or excepted and recyclables rates, if such increases would have resulted in *"National Composite"* (the national approach) r/vc ratios (by commodity) exceeding 146.0 percent. These national ratios were developed from the X386 Schedule C data. At that time, STR and SRC

claim, all that was necessary had been done to comply with the then applicable Ex Parte No. 394 requirements.

Subsequently, STR and SRC state, the Commission, in its Ex Parte No. 394 decisions served September 23, 1981, and November 20, 1981, announced for the first time that reductions and refunds should be based on the various geographical segments (segmented approach) of the X386 Schedule C data. These parties emphasize that nowhere in the Commission decisions was there "anything which would permit a departure from, or adjustment to, the numbers found in that Schedule C document." They therefore published reduced rates by following "the method dictated by the Commission" in those decisions. STR and SRC also point out that there are "practical considerations which militate against a retroactive application of the segmented approach as to the X375C exception." Some commodities which were excepted from the X375C increases under the national approach could in fact have taken some increase under the segmented approach. Conversely, some commodities which were subject to X375C increases under the national approach would have to be excepted under the segmented approach. STR and SRC urge that the Commission could avoid any complications arising from the recomputation of decreases and increases by viewing the Ex Parte No. 394 reduction methodology, i.e., segmented approach, as two separate but equally valid procedures. STR and SRC conclude that no further action should be required by the Commission.

The carriers are accurate in their statements that, at the time they attempted to comply with the then applicable Ex Parte No. 394 requirements, the segmented approach had not been established. They are also correct that refunds are required for certain movements under the segmented approach that, under the national approach, would have

been in compliance. At the same time, the carriers will be unable retroactively to increase their rates to earn higher revenues on commodities subject to rates that were reduced unnecessarily. We understand that railroads' concerns. However, the proper response is not to perpetuate an approach that we have found to be incorrect — the national approach — but to seek legal means to redress injuries. Any party that believes that it has been injured as a result of reliance on the national approach may submit additional comments on how the injury can be redressed. Such comments should discuss in detail the legal basis, if any, for redress and whether redress is administratively feasible at this time.[4]

Notwithstanding their arguments noted above, both STR and SRC did submit alternative data using the segmented approach. STR and SRC, as well as all of the other carriers, clearly set forth those recyclables which were excepted from the X375C increases and those to which the increases were applied, including the amount of the increases. Further, with the exception of one minor arithemtical error relating to ICG, all of the parties correctly calculated the minimum additional rate reductions needed effectively to eliminate the impacts of any X375C increases. This assures the rate reductions required in Ex Parte No. 394 meet the mandated 146-percent level, including the impact of any increases in X375C.

Each party has calculated the minimum additional reductions required by commodity and by traffic segment. These reductions are shown as follows: (1) N&W's supplemental statement at page 3; (2) SRC's supplemental

[4]Some railroads have indicated that they reduced rates for competitive reasons rather than our requirements under the national approach. In such cases, individual redress will not be granted.

statement - Appendix C of verified statement of Diane C. Moody; (3) SSR's supplemental statement - Page 7, Column 3 of table in verified statements of Hartley W. Hird; (4) STR's supplemental statement - Appendix C, pages 5 and 6 of verified statement of Diane C. Moody; and (5) ICG's supplemental statement - verified statement of Stanley P. Petraitis, Column 8 of Appendix 1 (except for Blast Furnace Products, reduction shown as 9.4 percent should be 8.4 percent) and column 7 of Appendix 2. The necessary reductions are set out in Appendix A of this decision. These reductions will be ordered.

B. **Chessie Evidence.** In complying with the Commission's order in Ex Parte No. 394, Chessie deviated, in part, from the approach taken by a majority of the other carriers by publishing joint and local proportional rates[5] on eleven recyclable commodities.[6] Concurrently, Chessie eliminated participation in movements of the 11 commodities with other carriers under joint rates. Chessie's new joint and local proportional rates result, in effect, in a two-part charge for a particular shipment — a rate per mile based upon car type and shipment weight, plus a flat charge per car. The flat charge varies only as to type of traffic, i.e. local, interline, or overhead.

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[5]ICC BEF 4600, effective December 12, 1981; and ICC BEF 4600-A, effective January 9, 1982. The tariff was not subject to investigation or suspension.

[6]Commodities included are: Cullett; Blast Furnace Products; Copper Matte; Lead Matte; Zinc Dross and Residue; Aluminum Residue; Miscellaneous Nonferrous Metal Residue; Brass, Bronze, Copper or Alloy Scrap; Lead Zinc or Alloy Scrap; Aluminum or Alloy Scrap; and Tin Scrap.

Chessie established these milege rates and flat charges per car based on variable costs of service by car type and shipment weight without regard to specific commodities.[7] These costs were then increased 46 percent, but the per-mile rates published are somewhat below the variable costs multiplied by 1.46.[8] The same approach was used in developing the flat charge per car. For local traffic, Chessie included both the variable origin and destination terminal costs. Interline traffic included one-half the variable and destination terminal costs plus one-half the variable interchange cost per loaded car between two carriers. Overhead traffic is based on the variable interchange cost per loaded car between two carriers. In each instance, the variable cost was multiplied by 1.46, and the flat charge per car was set somewhat below the resulting product. We conclude that Chessie's methodology is acceptable and the resulting rates are in compliance, since the rates are effectively set below the 146-percent benchmark.

Because Chessie's method of tariff publication is similar to Conrail's, the same problem noted by the court occurs in regard to other carriers which interline traffic with Chessie. That is, the possibility exists that resulting local

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[7]In developing such costs, Chessie relied upon Rail Form A applications for Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company and Western Maryland Railway Company, combined, for the year 1980. The resulting unit costs were updated to reflect July 1, 1981, wage and price levels. Chessie then developed total variable costs per loaded car-mile by equipment type and for varying weights.

[8]For example, based upon a C&O open hopper car with lading weight of 0-10 tons, the variable cost is 67 cents per mile. This cost was increased 46 percent, with the resulting product being 97.8 cents per mile. The actual rate per mile is published as 96.0 cents.

rates of other carriers which participate in combination movements with Chessie may have rates which exceed the 146-percent r/vc ratio. Accordingly, other carriers must now establish that their rates on such combination movements involving Chessie alone, Conrail alone, or Chessie and Conrail, do not exceed the 146-percent benchmark.

As to other recyclable commodities, Chessie continues to participate in Eastern Territory agency tariffs naming joint local rates. Thus, the same additional reductions, as shown in N&W's supplemental statement at page 3 (specifically as to single-line East, for Wood Scrap or Waste, Shipping Containers Returned Empty and Reclaimed Rubber only) should also apply to Chessie.

III. OTHER ISSUES

In its comments to Ex Parte No. 394, the National Association of Recycling Industries, Inc. (NARI) set out 8 examples of individual cases in which the carriers allegedly have not complied with the Commission's orders. Because of insufficient evidence, we are not able to make any conclusions concerning these allegations. However, if NARI elects to pursue these matters, it may do so in the opening supplemental statements to be filed, provided it is authorized to represent the affected firms. We also emphasize here that NARI's statement should provide complete details as to the allegations of noncompliance.

Western Electric has alleged that the carriers that are parties to tariff TEA 2008-L, Item 5750, minimum-weights 40,000, 60,000, and 80,000 pounds for scrap copper, STCC 40 212 4O, between East and South, have not complied with Ex Parte No. 394. Our review of the tariff shows that Western Electric is correct. Item 1.30 was added to Tariff ICC TEA 2008-L in Supplement 316, effective

December 26, 1981. This item made rates and charges in the tariff subject to Master Tariff of Reduced Rates, ICC WTL X394. In Supplement 340, effective March 28, 1982, Item I.30-A (which cancelled Item 1.30) eliminated reference to the X394 master tariff for rate reductions. This item and new Item 1.31 specifically published the reductions on recyclables. However, the reductions authorized applied only to the rates in four tariff items. Item 5750, which applies to Western Electric, is not one of the covered items. In view of this, the carriers will be ordered to make the proper tariff adjustments, unless they can establish good cause for not doing so. On September 20, 1982, the railroads filed a petition to reopen Ex Parte No. 394, to which several parties replied. We will, in the near future, issue a notice of proposed rulemaking addressing the petition and seeking public comments.

IV. CONRAIL DECISION

The Commission's decisions in *Conrail, supra,* directed "Conrail's joint-line connections to adjust their factors of the combination rates resulting from Conrail's cancellation. . . ." 365 I.C.C. at 601. This was to assure that shippers would not be paying in excess of 146 percent of variable costs on the resulting combination rates.

As noted earlier, the court vacated our order in *Conrail* and required the Commission to "(1) determine within 90 days of the date of this order the proper rates for *all* carriers, including Conrail, which will bring *all* rates to which Conrail is a party, joint, combination, or otherwise, down to a level at or below a revenue-to-variable cost ratio of 146%; (2) allow the rates currently on file to remain in effect until a new order issues; (3) include in its final order a refund provision which requires the carriers to refund any excess collected over the new appropriate rates since 1

August 1981, the date on which Conrail's new rates went into effect; and (4) reconsider the issues presented by New York Dock Railway and Brooklyn Eastern Terminal."

Based upon the present records in Ex Parte No. 394 and *Conrail,* only Chessie has submitted some of the necessary evidence to determine compliance. We are unable to determine whether other connecting carriers adhered to the Commission's directive. Perhaps the rate reductions previously required in Ex Parte No. 394 plus the reductions required by this decision would apply to some degree to the traffic at issue in *Conrail.* The application of these reductions, however, does not assure that every combination through movement involving Conrail will result in a ratio at or below 146 percent. Accordingly, all of Conrail's connectors, with the partial exception of Chessie, are required to submit statements demonstrating compliance with Ex Parte No. 394 for their factor of the through movements involving Conrail. *See* Appendix B.

Chessie did, however, adhere to the Commission's directive, at least as to the eleven previously-noted recyclable commodities. The combined through rates of any through movements via Chessie-Conrail only, as to any of the eleven commodities, would not result in a shipper's paying in excess of 146 percent. This is true, because neither Chessie's nor Conrail's proportional rates exceed the 146-percent level. As to the remaining recyclables, one inference is that Chessie does not participate in their movement with Conrail. Chessie, however, did not clarify this point, and we cannot independently verify traffic patterns. Chessie merely states that, as to the other recyclables, it continued to participate in Agency tariffs which publish *joint* and local rates. Chessie should clarify its position in relation to the other carriers.

In regard to the other carriers, the issue remains as to whether the connecting carriers' rates exceed 146 percent for that portion of the movement which does not occur on Conrail. In the carriers' supplemental statements to be filed herein, it must be conclusively shown that the rates which applied subsequent to the Conrail cancellation did not exceed the r/vc ratio of 146 percent. For any rate which did exceed the ratio, the amount of reduction and the applicable tariff must be set out.

In the order remanding the *Conrail* case, the Court instructed us to reconsider the issues raised by the New York Dock Railway and Brooklyn Eastern District Terminal. Our previous decision had resulted in a tie vote, and the Court concluded that "the failure to arrive at either a positive or negative conclusion on the public interest issue [deprived the Court] of jurisdiction to review that aspect of the ICC's order." While we are aware that these carriers have filed an abandonment application, we will reconsider the Class III carrier issues, since it appears that a substitute operator is being selected. Our reconsideration of this matter will be on the present record, although the Class III carriers may submit additional statements. A determination on the merits will be made at the same time the other matters are decided.

By petition filed May 17,1983, the nation's rail carriers seek a declaratory order and/or clarification regarding their obligations to make rate reductions and refunds under section 10731 and the orders in Ex Parte No. 394. Because of the substantial issues presented in this petition, we will defer refunds until we have considered the petition and replies.

V. TIME LIMITS

Finally, we must emphasize that we are under court order to issue a decision by July 5, 1983. Because of the time constraints, extensions of time to file will not be granted.

VI. FINDINGS AND ORDER

We find:

(1) UP's approach to west single-line rate is generally acceptable. However, the statement is deficient in that it fails to account for the X375C increase. A supplemental statement is required to clarify this matter.

(2) UP must take the appropriate reductions for individual commodities included in UP's non-ferrous metal scrap group. In doing so, the X375C increases, if any, must be taken into account.

(3) Milwaukee's approach to single-line rates is appropriate in all respects.

(4) Reductions set out in appendix A must be published. The appropriate refunds must be made, subject to any redress which may later be ordered concerning excessive rate reductions under the national approach.

(b) Chessie's joint and proportional rates on 11 recyclables are acceptable. An additional statement on the status of the remaining recyclables is necessary.

(6) Carriers which have joint movements with Chessie must establish that their rates for the 11 recyclable commodities (where Chessie maintains only local or proportional rates) do not exceed 146 percent.

(7) Relevant carriers must conclusively demonstrate that their rates do not exceed 146 percent for joint-line traffic with Conrail.

(8) The evidence is inconclusive as to NARI's allegations concerning eight instances where the Ex Parte No. 394 orders have been violated. Further evidence, however, will be accepted as to these allegations.

(9) Western Electric has established a *prima facie* case that Ex Parte No. 394 orders have been violated in ICC TEA 2008-L, Item 5750. The carriers must either correct the tariffs and make refunds or show cause why such correction and refunds should not be made. If correction and refunds are made, the carriers should so advise us.

(10) In all other respects the carriers have complied with Ex Parte No. 394.

(11) This decision will not affect the quality of the human environment or the conservation of energy resources.

It is ordered:

(1) Rate reductions as specified in Appendix A must be published by July 19, 1983.

(2) Supplemental statements, as required or permitted in Appendix 3, must be submitted by June 9, 1983.

(3) Reply statements are due June 20, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

(SEAL)

[APPENDIX A]

Reductions required to comply with orders in Ex Parte No. 394.

A. ICG Single-line Intradistrict South

SPC No.	Description	Additional Reduction
89.2	Rubber or Plastic Scrap or Waste	3.1%
91.1	Cullet	5.8
118.1	Blast Furnace Products	9.4
119.0	Copper Matte	6.8
119.1	Lead Matte	6.9
119.2	Zinc Dross & Residue	6.4
119.3	Aluminum Residue	6.2
119.4	Miscellaneous Nonferrous Residue	5.4
119.6	Brass, Bronze, Copper or Alloy Scrap	6.6
119.7	Lead, Zinc or Alloy Scrap	6.8
119.8	Aluminum or Alloy Scrap	11.1
120.0	Textile Waste	3.1
121.0	Paper Waste or Scrap	9.8

A. 2 ICG Single-line Intradistrict South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.6%
119.2	Zinc Dress & Residue	3.6
119.5	Ashes	3.4
119.7	Lead, Zinc or Alloy Scrap	3.5

B. SRC Single-line Intradistrict South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.6%
119.2	Zinc Dross & Residue	3.6
119.5	Ashes	3.4
119.7	Lead, Zinc or Alloy Scrap	4.5

C. 1 STR Interline Intradistrict South

SPC No.	Description	Additional Reduction
119.2	Zinc Dross & Residue	4.0%
119.5	Ashes	3.3
119.9	Tin Scrap	3.0

C. 2 STR Interline Interdistrict

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products (South to East)	2.4%
119.2	Zinc Dross & Residue (East to South)	3.2
119.7	Lead, Zinc or Alloy Scrap (East to South)	3.0

D. SSR Single-line Intradisctrict South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.8%
119.2	Zinc Dross & Residue	5.6
119.5	Ashes	3.6
119.7	Lead, Zinc or Alloy Scrap	3.7

E. 1 N&W Joint-Line East

SPC No.	Description	Additional Reduction
119.2	Zinc Dross & Residue	5.7%

E. 2 N&W Single-line East

SPC No.	Description	Additional Reduction
89.1	Reclaimed Rubber	6.2%
119.2	Zinc Dross & Residue	5.6
119.6	Brass, Bronze, Copper or Alloy Scrap	2.9
119.7	Lead, Zinc or Alloy Scrap	7.4
120.1	Wood Scrap or Waste	7.4
123.0	Shipping Containers Returned Empty	7.1

E. 3 N&W Single-line South

SPC No.	Description	Additional Reduction
118.1	Blast Furnace Products	3.8%
119.2	Zinc Dross & Residue	5.6
119.5	Ashes	3.8
119.7	Lead, Zinc or Alloy Scrap	3.9

E. 4 N&W Single-line West

SPC No.	Description	Additional Reduction
89.2	Rubber or Plastic Scrap or Waste	3.3%
118.1	Blast Furnace Products	13.0
119.1	Zinc Dross & Residue	6.3
119.6	Brass, Bronze, Copper or Alloy Scrap	2.9
119.7	Lead, Zinc or Alloy Scrap	7.4
120.0	Textile Waste	3.8
121.0	Paper Waste or Scrap	9.0

8F. UP Single-line West*

SPC No.	Description	Additional Reduction
054	Bakery Refuse	0.7%
119.2	Zinc Dross	6.4
119.3	Aluminum Residue	48.6
119.4	Miscellaneous Nonferrous Residue	17.2
119.7	Lead, Zinc or Alloy Scrap	9.9

*Reductions must, in addition, reflect any impact of X375C.

[APPENDIX 3]

SUPPLEMENTAL STATEMENTS

I. REQUIRED

A. ALL CARRIERS (EXCEPT CONRAIL)

Where applicable, evidentiary statements conclusively showing that rates for joint-line traffic with Conrail and/or Chessie (for Chessie's 11 commodities set out in footnote 5 of this decision) do not exceed the 14-percent benchmark. The statements shall also identify which rates exceeded the 14-percent ratio because of the Conrail cancellation in No. 38679 and/or the Chessie cancellation, the tariffs in which the needed reductions were made, and the effective dates of the tariff changes.

B. Chessie

Evidentiary statement conclusively showing that rates for joint-line traffic with Conrail (other than the 11 commodities set out in footnote 5 of this decision) do not exceed the 146-percent benchmark.

C. UP Single-line Western Rates

Evidentiary statement conclusively showing whether evidentiary data have accounted for any rate increases in X375C; if the data have not, then the statement must show: (1) what additional adjustments are needed and (2) what steps are being taken to make the appropriate adjustments.

II. PERMISSIVE

D. Class III Carriers

These parties may submit such information as they deem relevant. In the absence of further statements, the issues will be resolved on the present record.

E. NARI

This party may submit detailed data as to its allegations of non-compliance. If it does so, it must also establish that it is authorized by the firms on whose behalf it complains.

F. CARRIERS PARTY TO TEA 2008-L, ITEM 5750

These carriers may submit statements showing why corrective action is not necessary.

G. CARRIER REDRESSS FOR EXCESSIVE REDUCTIONS UNDER THE NATIONAL APPROACH

Carriers may submit comments on redress for rate reductions under the national approach in excess of those required under the segmented approach.

INTERSTATE COMMERCE COMMISSION

DECISION

Service Date
DEC 6 1982

EX PARTE NO. 394
COST RATIO FOR RECYCLABLES — 1980 DETERMINATION
No. 38805
RAILROAD COST RECOVERY INCREASE ON RECYCLABLES (OTHER THAN IRON AND STEEL SCRAP)

Decided: November 30, 1982

This decision evaluates (1) the carriers' compliance with our orders in Ex Parte No. 394 and (2) a proposed cost recovery increase on recyclables in No. 38805. The two matters are closely related. In Ex Parte No. 394, the nation's railroads were ordered to reduce rates on recyclables[1] to reflect a maximum ratio of 146 percent of revenue-to-variable costs and to provide refunds for the period between December 31, 1980, and the date the new rates went into effect. In No. 38805, the carriers proposed a 4.7-percent cost recovery increase effective March 13, 1982. This proposal was allowed to become effective but placed under investigation to determine if the cost recovery increase was properly applied to recyclable rates or whether the increase was applied so that the 146-percent ratio has been exceeded. We conclude (1) that the carriers have substantially complied with Ex Parte No. 394 and (2) in view of their compliance, the 4.7-percent rail carrier cost recovery increase is justified. However, in some instances compliance was not shown or remains unclear and additional statements are required.

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[1]Reference to recyclables in this decision does not include scrap iron and steel. Rather, it refers to all recyclables embraced by section 204 of the Staggers Act, nonferrous recyclables.

BACKGROUND

The issues in Ex Parte No. 394 relate to compliance with our prior decision at 365 I.C.C. 304 (1981). There, we required the carriers to reduce recyclable rates to comply with the court's decision in *National Ass'n of Recycling Industries* v. *I.C.C.*, 660 F.2d 795 (D.C. Cir. 1981). Rates could be no higher than 146 percent (revenue-to-variable costs) of the Schedule C data in Ex Parte No. 386, *Increased Freight Rates and Charges - Nationwide - 1981,* (not printed), served December 12, 1980. Following reductions in rates, the carriers were to initiate refunds to shippers of nonferrous recyclables. The refund period extended from December 31, 1980, to the date the reduced rates took effect.

In addition, we found that the question of compliance for Conrail and its connecting carriers would be decided in No. 38679, *Restructured Rates on Recyclables, O/T Iron or Steel Scrap, Conrail,* 365 I.C.C. 596 (1982) (*Conrail*). In the *Conrail* case, we determined (1) that Conrail's unilateral cancellation of single-factor joint rates was lawful under 49 U.S.C. §10705a and (2) that the revised rate structure complied with the 146-percent standard of Ex Parte No. 394.[2]

In No. 38805, the investigated matter is a 4.7-percent rate increase proposed under the rail carrier cost recovery procedures (RCCR) adopted in Ex Parte No. 290 (Sub-

[2]As Conrail points out, its compliance with both Ex Parte No. 394 and the 4.7-percent RCCR increase at issue in No. 38805 has already been discussed and decided in the *Conrail* case, *supra.* The National Association of Recycling Industries, Inc., repeats its contentions concerning the *Conrail* case in No. 38805; however, *Conrail* must stand on its own merits and will not be relitigated here.

No. 2), *Railroad Cost Recovery Procedures,* 364 I.C.C. 841 (1981), 365 I.C.C. 302 (1981), and 49 C.F.R. 1135 (formerly 49 C.F.R. 1102). In Ex Parte No. 290 (Sub-No. 2), by notice served December 22, 1981, the Commission permitted a similar increase to become effective on rates for commodities other than recyclables. The Commission also stated that after December 26, 1981 the carriers would be free to propose a separate cost recovery increase for recyclables subject to the condition that compliance with Ex Parte No. 394 be shown.[3] That led to the filing in issue here. When the 4.7-percent increase was filed for recyclables, serious questions were raised by National Association of Recycling Industries, Inc. (NARI) and Fort Howard Paper Company (Fort Howard) as to whether the carriers had complied with our order in Ex Parte No. 394. The increase was allowed to become effective, subject to investigation.

SCHEDULE C DATA IN EX PARTE NO. 386

If the carriers have complied with Ex Parte No. 394 by making the appropriate reductions, then the cost recovery increase in No. 38805 will be only a pass-through, and the mandated 146-percent ratio will remain intact. In Ex Parte No. 394, compliance was pegged to the Schedule C data in Ex Parte No. 386. However, questions have arisen with regard to these data as explained below.

The railroads issued Master Tariff X375C to become effective July 12, 1980. This tariff proposed selective increases in the carriers' rates and charges including those on

[3]If the carriers complied with the 146-percent level, the cost recovery increase of recyclables would not change the revenue-to-variable cost ratio.

recyclables. In Ex Parte No. 375 (Sub-No. 1),[4] the Commission suspended the proposed increases on recyclables to February 11, 1981. This suspension period was later extended to May 11, 1981. During the suspension period, increases proposed in Master Tariff X386 (including increases for recyclables) became effective on December 31, 1980. These increases were imposed on rates at the Master Tariff X368A level on recyclables because of the Ex Parte No. 375 (Sub-No. 1) suspension. Thus initially, Schedule C revenue figures for recyclables in Ex Parte No. 386 did not include any increases under Master Tariff X375C.

With the expiration of the Ex Parte No. 375 (Sub-No. 1) suspension period on May 11, 1981, the increases on recyclables in Master Tariff X375C became effective as proposed. NARI argues that resulting rate reductions to the 146-percent level, in purported compliance with Ex Parte No. 394, are illusory, since the Schedule C data could not reflect increased revenues from the Ex Parte No. 375 (Sub-No. 1) increases, and that the reduced rates are still above the 146-percent level. However, the railraods point out, and our own review of the tariffs also shows, NARI has failed to note that the railroads rolled back or partialy rolled back as necessary the X375 increases that became effective May 12, 1981.[5] These roll backs became effective on

[4] *Increased Frt. Rates & Charges – 1980 Nationwide,* 364 I.C.C. 874, 365 I.C.C. 6, 365 I.C.C. 304 (1981), *aff'd sub nom. Arizona Elec. Power Co-Op., Inc.* v. *I.C.C.,* 675 F.2d 303 (1982).

[5] For example, on cullet (broken glass), the carriers proposed increases in Part 7 of Item 975-A in Supplement 1 to Master Tariff X375C of 14.9 percent within the West and between the West and East, 9.9 percent within the South, between the South and the East, and between the South and the West, and 14.9 percent in boxcars and 5.9 percent on hopper cars within the East. These are the increases that were suspended (to the extent they exceeded 5.9 percent) and that became effective with the expiration of the suspension period on May

various dates in supplements to Master Tariff X375C.[6] NARI has also not considered that the Ex Parte 386 Schedule C revenue figures for many carriers have been adjusted where necessary to account for the Ex Parte 375 (Sub-No. 1) increases.

The increases to the base rates on various dates are summarized in the table below.

MASTER TARIFFS PRIOR 5/12/81	MASTER TARIFFS 5/12/81	MASTER TARIFFS 3/1/82*
X368A	X368A	X3681
X386	X375C (Full increase)	X375C (Adjusted)
RCCR	X386	X386
	RCCR	X394
		RCCR

*The final adjustments were not completed until February 1982, because of tariff publishing problems.

The basic approach for compliance by the carriers was to either account for the X375C increase by larger X-394 reductions, or by smaller X-375 increases. We have anal-

11, 1981. Subsequently, however, the carriers made several rollbacks in these increases in various reissues of Item 975. With Item 975-G of Supplement 85, effective July 23, 1981, the Part 7 increases on cullet were 5.9 percent on all joint line traffic, on all traffic moving from, to, or via Conrail, and on single line traffic for numerous individual carriers. (The use of the final adjustment in Item 975-G is somewhat oversimplified. Interim adjustments made in Items 975-C, -D, -E, and -F are omitted and are not necessary for this example.) The increases continued in effect only on single line traffic for certain individual carriers. Similar adjustments were made on other recyclables.

[6]NARI's confusion over the X375C supplements may stem from the fact that the republication was in the form of increases of a lesser degree, rather than reductions. Thus, if a 15-percent increase had originally been taken, and a 10-percent reduction was required, the supplement would show a 5-percent increase (15-10 percent), not the 10-percent reduction.

yzed the carriers' submissions and have correlated the tariff reductions with those movements where the ratios exceeded the 146-percent ratio. We conclude that the Schedule C data in Ex Parte No. 386 is a proper basis, and the rates for recyclables have been properly adjusted by supplements to the X375C and X-394 Master Tariffs, although, as stated below, certain problems remain.

RAIL COMPLIANCE – CALCULATIONS

We have reviewed the carriers' calculations for the rate reductions to determine if they reflect the directive in Ex Parte No. 394, including whether the impact of any X375C increases was considered.

As stated, the required reductions are measured by the Schedule C data from Ex Parte No. 386. In Schedule C, ratios are set out by commodity, for intradistrict single-line, intradistrict interline, and for six interdistrict interline traffic segments (e.g. East to West, West to East, etc.) Whenever the Schedule C data indicate a revenue-to-variable cost ratio higher than 146-percent for an individual recyclable, the carriers are required to reduce rates on that commodity to reflect no more than the 146-percent benchmark. For example, a Schedule C ratio of 156 percent requires a reduction of 6.4. percent to produce a ratio of 146 percent (e.g. [1.000-(1.46/1.56)]x 100 = 6.4%).

As mentioned earlier, the Schedule C data did not reflect the increases of Ex Parte No. 375 (Sub-No. 1) which were made effective subsequent to the development of the Schedule C data. Thus the Schedule C ratios are understated by the amount of the X-375 increases. For example, a Schedule C ratio of 150.6 percent would require a rate reduction of 3.1 percent to achieve a 146-percent ratio. If,

however, an increase of 7.6 percent had been taken in Ex Parte No. 375 (Sub-No. 1), then the Schedule C ratio of 150.6 percent would be understated. Instead, the resulting ratio would be 162.0 percent. Thus a 9.9 percent reduction is necessary to arrive at the 146-percent benchmark. Similarly, a Schedule C ratio may have been marginally below the 146-percent benchmark, with no rate reduction required. A Schedule C ratio of 141.1 percent would not necessitate any rate reduction. However, if a 6.7 percent increase were taken in the X-375 tariff, the ratio would increase to 150.5 percent. Such a ratio would require a rate reduction of 3.0 percent to achieve the 146-percent level.

THE WESTERN RAILROADS

The western railroads' calculations for the reductions, directed to the following traffic segments, are generally acceptable: West, intradistrict single-line and interline, interdistrict East to West, West to East, South to West and West to South. Those commodities and traffic segments in Schedule C of X-386 which reflected ratios greater than 146-percent were appropriately identified, and the resulting reductions were calculated in a proper manner. In addition, those commodities and traffic segments for which X375C increases were apparently taken were also considered in calculating the required reductions with some exceptions noted later. For example, the Schedule C ratio for Blast Furnace Products, West single-line, was 160.1 percent. An 8.8-percent reduction would be required to reduce these rates to the 146-percent benchmark. The railroads, however, correctly restated this ratio to reflect the impact of the X375C increase of 10.3 percent. the resulting restated ratio was 176.4 percent, which requires a 17.2-percent reduction to reflect the 146 percent benchmark. Accordingly, the 17.2-percent reduction was relied

upon by the railroads in lieu of the 8.8-percent reduction which would have applied in the absence of Ex-Parte No. 375 (Sub-No. 1). In a number of instances, for competitive reasons, some carriers took greater reductions than were required. For Brass, Bronze, Copper or Alloy Scrap, the required reductions were 8.4 percent for West single-line traffic and 16.4 percent for West intradistrict interline traffic. The Western Pacific Railroad Company, for example, took the 16.4-percent reduction on its single-line rates.

Two western railroads, the Union Pacific Railroad Company (UP) and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor (Milwaukee), departed from the use of the X-386 Schedule C data in determining the percentage reductions required for their West, single-line rates.

UP indicates that it determined whether any recyclable traffic moving single-line had a ratio greater than 146 percent by utilizing "a 1979 traffic base 'Schedule C' computer run at the X-386 level." According to UP, this study showed that only one commodity had a ratio greater than the 146-percent benchmark. UP indicates that this commodity was Blast Furance Products and that a reduction of 42.3 percent was required. UP also stated that "[t]he reductions in other Union Pacific single-line rates on nonferrous recyclables were made to keep Union Pacific competitive with reduced joint-line rates." While UP's 42.3-percent reduction is significantly higher than the reduction that would have been required under X-386 Schedule C ratios, its study results were not submitted, and we cannot verify its claims.

UP states that no reduction was taken on one specific movement of fly ash, from Point of Rocks, WY to Heppner, OR. According to UP, the reduction was not applied

"because that rate was not in effect in the base period covered by the Schedule C data, was subsequently renegotiated with the shipper, and does not exceed the 146 percent cap." UP did submit specific rate-cost evidence for this single movement. The data appear to have been developed in an acceptable manner and show a ratio of 132.8 percent.

Milwaukee also appears to have departed from use of the X-386 Schedule C data for its single-line reductions. In its verified statement, Milwaukee states that "effective December 28, 1981, Milwaukee Road published maximum mileage rates on recyclable commodities by car type (box, hopper, gondola) applicable between stations on the Milwaukee Road. Under this tariff, no Milwaukee Road single-line rate on recyclables other than scrap iron and steel has a ratio of revenue to variable cost exceeding 1.46." No other evidence was offered regarding single-line rates. However, Milwaukee appears to have used an approach similar to Conrail's, which has been accepted. See *Conrail, supra,* pp. 600-602. There, Conrail had cancelled its existing rates on recyclables, both single-line and joint-line, and established new single-line and proportional rates. However, Conrail's compliance with Ex Parte No. 394 was determined after acceptance of Conrail's data. *Conrail, supra* at 607-612. No such data have been submitted here, and thus we cannot verify Milwaukee's compliance.

Norfolk and Western Railway Company (N&W) and Illinois Central Gulf Railroad Company (ICG) indicated that reductions were taken for traffic segment West, intra-district single line. The commodities were properly identified and the correct percentage reductions were calculated based upon the X-386 Schedule C data. However, neither carrier clearly indicated whether the impact of any

possible increases in X375C had been taken into consideration.

THE SOUTHERN RAILROADS

The southern railroads also calculated rate reductions directed to the specific traffic segments: South, intradistrict single-line and interline and interdistrict, and East to South and South to East. These reflect the appropriate commodities and traffic segments which, in Schedule C of X-386, had ratios greater than 146 percent. Further, the percentage reductions have been calculated correctly. The record, however, is not totally clear in regard to the possible impact of any X375C increases. Verified Statement No. 2 of Frances M. Spuhler, attached to the Opening Statement of Facts and Argument by Southern Territory Railroads, is directed to the traffic segments, South, intradistrict interline, and interdistrict East to South and South to East. This statement sets forth the various X375C increases and exceptions by recyclable commodity. It is indicated that no X375C increases were taken on Cullet, Aluminum Residues, Copper or Lead Matte, Aluminum Scrap, Bakery Refuse, and Miscellaneous Non-Ferrous Metal Residues. The calculated reductions involving these commodities based on X-386 Schedule C data are acceptable and need no adjustments.

However, there are other commodity groups for which the calculated reductions appear insufficient to comply with Ex Parte No. 394. For example, the statement indicates that for Zinc Dross and Residues, a 4-percent increase to, from, and within the South was applied in X375C. However, the attached tariff indicates that the increase was 6 percent instead of 4 percent. More importantly, the X-386 Schedule C ratio for South intradistrict in-

terline for this commodity was 197.3 percent, requiring a 26.0 percent reduction (which does not reflect the impact of the X375C increase, either 4-percent or 6-percent). Based upon our calculations, a 4-percent increase would result in a restated ratio of 205.1 percent and require a 28.8-percent reduction. A 6-percent increase in X375C would produce a higher ratio and require an even greater percentage reduction. Absent any other explanation, the railroads' calculated percentage reduction of 26.0 percent appears to be an understatement of the required reduction. Similar situations exist, since X375C increases appear to have been taken but not considered in the calculated percentage reduction for the following commodity and traffic segments:

1. Blast Furnace Products - South to East,
2. Ashes - intradistrict interline,
3. Tin Scrap - intradistrict interline,
4. Lead, Zinc or Alloy Scrap - East to South,
5. Brass, Bronze, Copper or Alloy Scrap - East to South and South to East.

Regarding the South single-line traffic segment, Southern Railway Company (SRR) indicated seven specific commodity groups which were excepted from any X375C increases, while noting that the remainder were allowed to stay in effect. SRR has correctly identified and calculated the percentage reduction based upon the X-386 Schedule C data. However, four commodity groups, namely Blast Furnace Products, Aluminum Residue, Ashes and Lead, Zinc or Alloy Scrap, increases in X375C were apparently taken. The calculated reductions, however, shown by Southern for these four commodities do not reflect the impact of the X375C increases and therefore appear to be understated, based on the present rec-

ord. Additionally, the ratio for Zinc Dross & Residue was 145.9 percent before X375C, thus requiring no reduction. If, however, a 4-percent increase was taken in X375C, the ratio would exceed the 146 percent benchmark and a reduction would be required.

With one minor exception Family Lines Rail System, N&W and ICG also have correctly identified and calculated the percentage reductions for the South single-line segment based upon the X-386 Schedule C data. The exception relates to N&W's calculated reduction of 22.3 percent on Bakery Refuse. This is apparently a mathematical error as the correct reduction is 23.5 percent.

Nevertheless, we cannot fully determine whether any of the carriers have adequately considered the impact of any possible increases in X375C as to South single-line reductions. Numerous assertions are made by all that such increases have been considered, and numerous tariff citations are made. However, none of the carriers clearly set forth (in a manner such as Southern, for example) which specific commodities took the increases and the amount of the increases.

THE EASTERN RAILROADS

The same situation regarding general compliance with X-394 and questions about X375C exists regarding both East intradistrict single-line and interline traffic segments, except for Conrail and, in part, by the Chesapeake and Ohio Railway Company (Chessie). As noted previously, Conrail departed from the use of X-386 Schedule C data by establishing in effect a new rate structure which, in No. 38679, *supra,* was found in compliance with X-394. Conrail did so for both single- and joint-line traffic, while Chessie has taken a similar approach regarding its single-line traffic only.

For the remainder, the appropriate commodities and traffic segments have been identified, and the resulting percentage reductions calculated are correct, if no consideration is given to possible increases in X375C. Again, none of the involved carriers clearly set forth, by commodity, the possible exceptions to, and percentage increases taken, in X375C. Accordingly, we cannot be assured that the impact of X375C has been considered as to the East intradistrict single-line or joint-line reductions (including those of Chessie).

Based on the use of unadjusted X-386 Schedule C data, the carriers have complied for the most part with our order in Ex Parte No. 394, except for West single-line rates for Milwaukee and UP, as discussed above. And, contrary to NARI's arguments, many carriers have made adjustments for increases under Master Tariff X375C, and those adjustments are verifiable by cross-checking with the Schedule C datas. Where adjustments with regard to X-375 increases are not clear, we are requiring supplemental statements with more detail as to the mechanics of the carriers' compliance. UP and Milwaukee will be ordered to submit underlying data on all aspects of their West single-line rate reductions.

Because of the rate reductions taken in both the X375C and X-394 master tariffs and supplements, we conclude that the 4.7-percent RCCR increase in No. 38805 may be properly taken. As stated earlier, if the X375C increase and the X-394 reductions have been properly published, the RCCR increases will not affect the 146-percent ratios.

This conclusion also applies to those carriers who have reduced their rates but whose evidence and degree of compliance, mainly with regard to X-375 increases, is not entirely clear. This conclusion is justified for several reasons.

First, the question is whether the published reductions are sufficient. Second, if the reductions are not sufficient, the additional rollbacks can be published in Master Tariff X-394 and reparations will still be due in accordance with Ex Parte No. 394. Because the carriers have the burden of establishing their compliance with Ex Parte No. 394, there is no shifting of the burden of proof by approving the RCCR increase. Third, it would be inappropriate on this record to order reductions in No. 38805 on the premise that the proper reductions may not have been made in some instances, because here an alternative (refunds) is still available for the shippers. Fourth, if the RCCR increase is due the carriers but disallowed here, the reductions (even though temporary) would adversely affect the carriers' needs to achieve revenue adequacy.

Finally, the carriers' compliance statements that refunds are being made or that the refund mechanism is in the process of being implemented complies with the Ex Parte No. 394 order. While NARI argues that both the rate reductions and the refunds have been somewhat delayed, we are aware of the complexities involved in the tariff publication and refund mechanisms. We note that any delays in tariff publication or refunds is subject to interest.

SPECIFIC MOVEMENTS

Fort Howard has submitted cost data purportedly reflecting the costs of service for 9 selected movements of wastepaper to its plants in Green Bay, WI, and Muskogee, OK. These data show variable costs which, when divided into revenues, produce ratios from 149 to 253 percent, all above the 146-percent maximum. However, we must reject Fort Howard's cost study because of its serious deficiencies, including sampling problems, use of outdated costs,

lack of adequate explanations for various procedures, and lack of workpapers.

Despite the importance of a statistical sample to the cost data development, Fort Howard's statement of its sampling procedure is limited to a 3-sentence explanation, essentially stating that, at the cost analyst's request, Fort Howard provided a sample of freight bills covering scrap paper movements. Inspection of these freight bills (and the workpapers) by carrier witnesses reveal that, of the 9 origin-destination points, 5 reflect a sample of only 1 carload, 2 reflect only 2 carloads, and only 2 reflect samples greater than 2 carloads (3 and 6 carloads). One carrier witness states that Fort Howard's cost analyst had no knowlege concerning the process of selecting the freight bills; further, no other evidence describing the freight-bill selection process was made available to the carrier witness for Western Railroad Association (WRA).

The WRA witness points out that the ranges of both tare and lading weights have substantial variations. Because these variations have a significant impact on costs of service, the validity of the statistical sample is of prime importance. The range of weights is illustrated by the movement between Appleton and Green Bay, WI. Six shipments ranged from 47,000 to 64,000 pounds for tare weight and from 71,210 to 91,395 pounds for lading weight. Thus, no statistical validity can be assigned to the sample where only 6 shipments, selected by unknown means, are held out to represent hundreds of carloads.

Even if the statistical sample were valid, other deficiencies exist. Despite the extensive geographic areas and the number of carriers (eight) which must be considered, Fort Howard's commentarry for its cost evidence is only general in nature. Fort Howard did submit the traffic service units included in its study. It omitted, however: (1) Rail

Form A applications for the eight carriers (and thus how the service units were determined); (2) work papers to support destination switching and detention adjustments; and (3) workpapers showing the development of update factors. These omissions prevent the Commission from accurately evaluating the costs of individual movements. Finally, we note that the many other specific criticisms by the carriers appear to be valid; however, because of the specific deficiencies listed above, it is not necessary to evaluate the remaining criticisms.

Fort Howard correctly points out in its argument that shippers need not accept the Schedule C averages and could file formal complaints. Ex Parte No. 394, *supra* at 307. As Fort Howard states in its pleading, the conclusion to be drawn from the Commission's position is that "*properly developed* specific costs control over Schedule C." (Emphasis added.) However, costs were not properly developed here, considering both the seriousness and the extent of the deficiencies. Thus it would not be appropriate for us to take action at this time or pursue the question of carrier compliance as to the specific Fort Howard movements. *See, Vermonth Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). While Fort Howard has mentioned the difficulties of compiling its case within the time schedules here, we note that it is not precluded from filing a formal complaint concerning these individual movements. See Ex Parte No. 394, *supra,* p. 307. We conclude that the evidence of record is insufficient to determine if the revenue-to-variable cost ratios exceed 146-percent for these movements. This conclusion is reached without prejudice to Fort Howard's filing a complaint concerning these movements.

We find:

The carriers have complied with Ex Parte No. 394, *supra,* except to the extent discussed in the decision. The 4.7-percent increase in No. 38805 is found justified, with the reservations expressed in the decision as summarized in the appendix. Specific rail movements alleged by Fort Howard Paper Company to exceed the 146-percent ratio are not shown in noncompliance.

This decision will not significantly affect the quality of the human environment or energy resources.

It is ordered:

(1) The investigation in No. 38805 is discontinued.

(2) The carriers, to the extent compliance with Ex Parte No. 394 cannot be fully evaluated, shall submit supplemental statements in Ex Parte No. 394, as detailed in the appendix, to evidence their compliance with our orders. Statements are due 30 days from date of service of this decision.

(3) This decision shall be effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison. Commissioner Sterrett was absent and did not participate.

Agatha L. Mergenovich
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

DECISION

Service Date
NOV 27 1981

Ex Parte No. 394

COST RATIO FOR RECYCLABLES – 1980 DETERMINATION

Decided: November 20, 1981

The railroads[1] have petitioned the Commission to reopen this proceeding, to permit the introduction of evidence regarding the issues raised, and to stay the effective date of the previous decision[2] pending consideration of the petition to reopen. Fort Howard Paper Company has also requested reopening of the proceeding. A reply to the petitions was filed by the National Association of Recycling Industries, Inc. (NARI).

One issue raised by the carriers warrants reopening of the proceeding. In the previous decision, the Commission ordered the carriers to reduce rates for recyclables to the 146 revenue-to-variable cost ratio level, and to calculate the reductions using lines 49-51 of Schedule C[3]. The carriers argue that for interline interdistrict rates, line 52 should be the basis instead.

They contend that for interline interdistrict movements lines 49-51 reflect only portions of rates from divisions of joint rates. As shippers, as well as Section 204 of the Staggers Act, are concerned with rates rather than divisions of rates, line 52, the carriers argue, is the proper basis for rate

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[1]Except Conrail.

[2]Ex Parte No. 394, *Cost Ratio For Recyclables – 1980 Determination*, 365 I.C.C. 304 (1981).

[3]Schedule C contains cost and revenue data developed for use in Ex Parte No. 386, *Increased Freight Rates and Charges – Nationwide – 1981* (not printed), decision served December 12, 1980.

reductions. Line 52 represents whole movements rather than portions of movements and rates. The carriers contend further that modifying portions (divisions) of rates rather than whole rates would be a virtually impossible task.

In its reply NARI argues that Line 52 is the same as a "national composite" and should be rejected for the same reasons the Commission rejected the use of national composite ratios in the previous decision. NARI suggests, for example, that for West-East interdistrict movements of lead and mine scrap, the eastern carriers have a rate which results in a ratio of 171.2 percent (line 49), the western carriers have a rate which results in a ratio of 199.6 percent (line 51), and line 52, which is 181.9 percent, is a national composite ratio for all these interdistrict rates.

NARI's characterization of line 52, however, is incorect. For an interdistrict interline movement, the carriers generally offer a joint rate, rather than one rate for, i.e., the eastern part of the movement and another rate for the western part. Thus the 171.2 percent cited by NARI represents the costs and revenues not for eastern movements and rates, but for the eastern portions of joint movements. Furthermore, the revenues earned by the eastern carriers depend not only on the rate charged by the carriers, but also on how the carriers have agreed to divide the revenues among themselvs. Since section 204 requires rates rather than portions of rates be at the lawful level, and since shippers are primarily interested in the level of rates rather than in how carriers split the revenues from those rates, line 52 provides the proper basis for these rate reductions.

We have also considered the other issues raised by the carriers and by Fort Howard Paper Company. These issues were correctly decided and adequately discussed in

our prior decision, and no further discussion of them is warranted here.

The last issue to be considered is the carriers' request for a stay of the effective date of the prior decision. It is true, as argued by NARI, that the request for stay did not comply with the time requirements of the Commission's General Rules of Practice. However, since we have modified our prior decision, we will grant the carriers an additional two weeks in which to make the required rate changes. The additional period should allow the carriers time to calculate the rate changes correctly, so that this somewhat extended litigation can come to a close with as few additional adjustments and problems as possible. The shippers, of course, are entitled to refunds for this additional period.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The petition of Fort Howard Paper Company is denied.

The petition of the railroads to reopen and to allow additional evidence is granted and our prior decision is modified to the extent described above.

For the purpose of reducing rates, the railroads are granted an additional two weeks beyond the time stated in the prior decision.

By the Commission, Chairman Taylor, Vice-Chairman Clapp, Commissioners Gresham and Gilliam. Commis-

sioner Gresham dissented in part with a separate expression.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

COMMISSIONER GRESHAM, dissenting in part, believes that the majority has once again failed to address adequately the refunds issue. He adheres to his earlier dissent on refunds.

EX PARTE NO. 394[1]

COST RATIO FOR RECYCLABLES — 1980 DETERMINATION

Service Date
OCT 13 1981

Decided September 23, 1981

Carriers ordered to reduce rates for nonferrous recyclables immediately to the 146-percent revenue-to-variable cost ratio level and to initiate refunds to shippers for the period between December 31, 1980 and the date the reduced rates go into effect.

Edward L. Merrigan for the National Association of Recycling Industries, Inc.

Gray Centrich, John H. LeSeur, C. Michael Loftus, and *William Slover* for Fort Howard Paper Company.

Harry N. Babcock, Emried D. Cole, Jr., John A. Daily, James L. Howe III, Richard W. Kienle, Albert B. Russ, Jr. and *James E. Sykes* for the railroads.

DECISION

BY THE COMMISSION:

Section 204 of the Staggers Rail Act of 1980 defines a revenue-to-variable cost ratio to be used as a ceiling on rail rates for recyclable commodities other than scrap iron and steel. In Ex Parte No. 394, *Cost Ratio for Recyclables — 1980 Determination,* 364 I.C.C. 425 (1980), the Commission calculated that ratio to be 146 percent, and ordered the railroads to refrain from increasing the rates on recyclables, other than scrap iron and steel, when increases

[1]This decision embraces No. 38641, Petition for Expedited Relief Under Section 204, P.L. No. 96-488, No. 38661, Petition for Enforcement — Fort Howard Paper Company, and Ex Parte No. 375 (Sub-No. 1), Increased Freight Rates and Charges — 1980 Nationwide, Phase II.

would produce a revenue-to-variable cost ratio greater than 146 percent. On July 15, 1981, the Court of Appeals for the District of Columbia Circuit, holding that the Commission should have also ordered an immediate reduction in rates having ratios greater than 146, remanded the case for further proceedings. *Nat. Ass'n of Recycling Industries* v. *I.C.C.*, No. 81-1051 (D.C. Cir. 1981).

A petition regarding the implementation of the court's order has been filed by the National Association of Recycling Industries, Inc. (NARI). The western railroads and Conrail have replied.[2] In addition to resolving the issues raised in these pleadings, this decision will also consider issues raised in other proceedings concerning recyclables rate increases.

Implementation of the Court Order

It is clear from the court decision that we must order the railroads immediately to reduce rate for nonferrous[3] recyclables. Remaining at issue, however, are: (1) whether the amount of reduction should be measured by data from Ex Parte No. 319[4] or by schedule C data from Ex Parte No.

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[2]The reply by Conrail was filed late. However, since there has been no motion to strike, and since the reply pertains to recent rate changes made by Conrail, the reply is accepted.

[3]The term "nonferrous recyclables" here refers to all recyclables embraced by section 204 of the Staggers Act. It includes recyclables such as mill scale which may contain iron but which are not classified for transportation purposes as scrap iron or steel.

[4]Ex Parte No. 319, *Investigation of Frt. Rates Recyclable Commodities*, 356 I.C.C. 113 (1977); remanded, *sub nom., National Ass'n of Recycling, ETC.* v. *I.C.C.*, 585 F.2d 522 (D.C. Cir. 1978); modified, 361 I.C.C. 238, 641, 856 (1979); remanded *sub nom., National Ass'n of Recycling Industries* v. *I.C.C.*, 627 F.2d 1328 (D.C. Cir. 1980); reopened for further proceedings, 364 I.C.C. 874 (1981).

386.[5], (2) whether reductions should be ordered based on a national average ratio for each commodity; and (3) whether refunds should be ordered.

Regarding the amount of reduction necessary, NARI suggests that reductions first be made based upon the cost ratios developed for Ex Parte No. 386. The next step, according to NARI, would be reductions in rates for commodities whose Ex Parte No. 319 ratios were above 146 if those rates had not already been reduced following examination of the Ex Parte No.386 data.

The carriers argue that Ex Parte No. 386 data should be the basis for reductions, since those data were developed relatively recently and represent a traffic study of all carlods of recyclables handled in line-haul service by the class I railroads. In contrast, the Ex Parte No. 319 data were based upon selected movements only, and, having been developed in 1976, are stale. Finally, the railroads contend that if the schedule C data are selected as the best evidence, the second-best Ex Parte No. 319 data should be disregarded.

We agree with the railroads that Ex Parte No. 386 data should be used in this proceeding. The major advantage of the Ex Parte No. 319 data is that the ratios contain cost adjustments peculiar to individual movements.[6] Schedule C data, having been developed for general increases on a national scale, are not similarly refined.

However, schedule C data are more refined geographically than are Ex Parte No. 319 data. For example,

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[5]Ex Parte No. 386, *Increased Freight Rates and Charges – Nationwide – 1981* (not printed), decision served December 12, 1980.

[6]For a discussion of these cost adjustments, see 356 I.C.C. 113, 137-138.

schedule C contains ratios for a particular commodity for movements within the major territories (East, South, and West) on interline and single-line bases and for movements between territories by origin and destination territories. In contrast, Ex Parte No. 319 contains only a single ratio per territory for each commodity.

Also, as stated by the carriers, the Ex Parte No. 319 evidence is quite old. The movements, for example, originated in 1975 and similar movements may no longer occur. Furthermore, the costs associated with these movements were developed from 1973 and 1974 data. See, 356 I.C.C. 113, 120-132. Finally, the ratios have not been updated since 1979. Considering the cost increases and rate changes that have occurred since then, the ratios are likely to be unreliable without further updating. While some form of updating could possibly be achieved, the updating process may distort the ratios to a certain degree.[7]

In contrast, the schedule C ratios encompass all movements of recyclables and use relatively recent revenue and cost information. For these reasons, we conclude that the Ex Parte No. 386 ratios are superior for the purposes of this proceeding. Having come to this conclusion, we conclude further that examination of the Ex Parte No. 319 cost ratios is not warranted.

It should be noted that the further updating of the Ex Parte No. 319 ratios is one of the issues for which we requested coments in the pending Ex Parte No. 319 proceeding. The time periods and issues involved in that proceeding differ from those under consideration here, so

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[7]See 361 I.C.C. 238, 239-240 for a discussion of the problems involved in updating the Ex Parte No. 319 ratios. The problems become more significant, of course, with the passage of time.

that our findings here are not necessarily controlling for that proceeding.

We also note that effective August 1, 1981, Conrail made a major adjustment to its rate structure for recyclables. That adjustment is under investigation in No. 38679, *Restructured Rates on Recyclables, O/T Iron or Steel Scrap, Conrail* (not printed), procedural decision served July 31, 1981. Whether Conrail's new rates comply with the 146-percent standard, and the type of evidence needed to substantiate such a conclusion, will be considered in that proceeding.

In the decision served July 31, 1981, we also ordered Conrail's connecting carriers to adjust their rates within 30 days so that their portions of the combination rates would not exceed the permissible level. Since we have an outstanding order concerning the connecting carriers' rates in that proceeding, our orders in the decision here will not, unless otherwise noted, pertain to those rates.

The next question, which is whether the reductions should be ordered on a national or on some smaller geographical division level, arises because schedule C contains ratios for single-line intradistrict movements by district, interline intradistrict movements by district, and for interline interdistrict movements. In Ex Parte No. 319, the smallest area for which ratios and rate reductions were calculated was the district or territory. In further contrast, the 146-percent figure is a national average.

In the proceeding here NARI argues that the Commission should order reductions wherever the Ex Parte No. 386 evidence shows ratios higher than 146. In reply, the carriers point out that the 146-percent figure was developed as a national average using a national proportion of

fixed to variable costs. The carriers argue further that unless the proportion of costs for a particular interline movement, for example, was the same as the national proportion of fixed to variable costs, the 146 figure is not a true measure of revenue adequacy as defined by section 204.

The railroad analysis is correct to the extent that the 146 figure is an average, and not all segments that make up an average figure are going to have the same characteristics as the average. However, section 204 states that "as long as any such rate equals or exceeds such average revenue-to-variable cost ratio * * * such rate shall not be required to bear any further rate increase * * *." This wording indicates that Congress intended that the average figure be applied to individual rates.

As a practical matter, it would not be feasible to require the carriers to develop ratios for every individual movement. We also realize that tariff changes will be more numerous and complex if the schedule C traffic segments are used. However, to come as close as possible to applying the average figure to individual rates, we will require reductions based on the schedule C traffic segments. This method will best serve the purposes Congress intended to achieve with section 204.

Furthermore, should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission. For future rate increases for recyclables, we expect the carriers, including Conrail and its connections, to submit cost evidence to demonstrate that the proposed in-

creases will not result in rates that exceed the permissible level.[8]

The next issue to be decided is whether refunds should be ordered. The railroads argue that they relied in good faith upon our prior decision in this proceeding, and that section 204 does not provide for refunds.

The Commission arguably is not required under all circumstances to order reparations or refunds of unlawful charges. *Inspection in Transit, Grain and Grain Products,* 359 I.C.C. 624 (1979). We conclude, however, that refunds are warranted here. First, the railroads have not acted in reliance upon our decision other than to let rates already in effect remain in effect. Furthermore, whatever reliance the carriers had upon that decision was surely tempered by the facts that our Ex Parte No. 394 decision was immediately appealed and it was clear that the issues would be settled finally by the courts.

Section 204 of the Staggers Act indirectly supports a refund order also. Not only does the section contain a 90-day time period for implementatin, but, as emphasized by the court in its remand decision, Congress deliberately chose to single out nonferrous recyclables for special treatment. Refunds will merely place shippers of recyclables in the position financially that Congress intended they should occupy 90 days after enactment of the Staggers Act.

We shall also require that refunds be initiated by the carrier rather than through shipper action. We realize that

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[8]This will require a change in the rules adopted in Ex Parte No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures,* 364 I.C.C. 841 (1981). Our duty to ensure that no ratio exceeds 146 percent cannot be complied with under the existing automatic general increase procedures.

there are advantages and disadvantages in ordering carrier-initiated refunds rather than a claims procedure. See, *Increased Freight Rates and Charges, 1978, Nationwide,* 365 I.C.C. 14, 19-20 (1981). However, considering the number of shippers involved, the calculations which the carriers themselves must perform before rate reductions and therefore refunds are determined, and the congressional emphasis on the importance of recycling, we conclude that requiring the carriers to initiate the refunds is the best method to insure that all payments required are made.

Issues in Related Proceedings

Our decision here effectively resolves issues raised concerning recyclables rate increases since our previous decision in Ex Parte No. 394. The issue increases include 1.1-and 2.8-percent increases requested under Ex Parte No. 290 (Sub-No.2), *Railroad Cost Recovery Procedures,* 364 I.C.C. 841 (1981), and increases which became effective in May 1981 following expiration of the suspension period imposed in Ex Parte No. 375 (Sub-No. 1), *Increased Freight Rates and Charges — 1980 Nationwide, Phase II* (not printed), decision served July 3, 1980. The basic issue contested by the parties is whether these increases complied with our previous decision that carriers may not increase rates for a recyclable when the increase would result in a ratio greater than 146. As we are here ordering the carriers to reduce the rates for recyclables to the 146 level, previous rate increases will be eliminated for the future to the degree the total rate exceeds the permissible level. Our refund order should similarly resolve the questions of past unlawful increases.

Summary

In summary, we will require the following as proper compliance with the court decision:

(1) The carriers, except as noted in (3), will reduce rates for nonferrous recyclables to the 146-percent level within 60 days of the service date of this decision.

(2) The carriers will calculate the rate reductions using the schedule C data from Ex Parte No. 386. The ratios to be compared with 146 are those found in lines 49-51 of schedule C. The carriers will use the smallest segments of data for their calculations, ie., where schedule C indicates a ratio greater than 146 in any segment, the rate reduction wil take place in the segment rather than in any "Total" of which the segment is a part.

(3) Conrail's compliance will be addressed in No. 38679. Its connecting carriers will reduce their rates for Conrail-handled traffic in accordance with our decision in No. 38679.

Following reductions of the rates, carriers will initiate refunds to shippers of nonferrous recyclables for the time period between December 31, 1980 and the date the reduced rates go into effect. Conrail and its connecting carriers will initiate refunds for traffic handled by Conrail between December 31, 1980 and August 1, 1981. The refunds for Conrail-handled traffic, as well as for other traffic, will be calculated using Ex Parte No. 386 data.

Interest will be awarded pursuant to the Commission's *Notice of Revised Procedures to Calculate Interest Rates* (not printed), served April 18, 1977. Under that notice, interest should be the auction established average yield on 91-day, 13-week Treasury bills for the week in which the first unlawful charge was paid.

Commissioner Gresham, concurring in part and dissenting in part:

Although I believe the Commission should have sought further review of the court's decision on this case, a majority of the Commission disagreed with my position. Because that court decision now stand unassailed by the Commission, we have no choice but to order an immediate reduction in rates in this proceeding. However, the court's decision does not dictate any particular result on the refund issue. Thus, the Commission must exercise its discretion on the matter.

In my opinion the decision does not correctly or adequately address the refunds issue. If refunds are to be made, I believe the earliest date from which they should be ordered is the date of the court's remand decision. The majority seems to say that the railroads should not have relied on the Commission's decision. If those whom the Commission regulates cannot rely on the decisions of this agency, to whom the Congress has entrusted the implementation and administration of the surface transportation laws, then on whose decisions are they to rely?

It is ordered:

The railroads shall reduce rates and initiate refunds as discussed in this decision.

For future nonferrous recyclables rate increases, the railroads will be required to submit cost evidence to demonstrate that the proposed increases will not result in rates that exceed the permissible level. A notice in Ex Parte No. 290 (Sub-No. 2), *supra,* will be issued shortly addressing this matter.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam. Commis-

sioner Gresham concurred in part and dissented in part with a separate expression.

APPENDIX C

No. 82-1066

September Term, 1981
Ex Parte No. 394

THE BALTIMORE & OHIO RAILROAD COMPANY *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents

ALUMINUM ASSOCIATION, INC. and NATIONAL
ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Intervenors

No. 82-1067

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES OF AMERRICA,
Respondents

ALUMINUM ASSOCIATION, INC. and NATIONAL
ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Intervenors

No.82-1068

ALABAMA GREAT SOUTHERN RAILROAD *et al.*,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents

ALUMINUM ASSOCIATION, INC. and NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Intervenors

Petitions for Review of an Order of the Interstate Commerce Commission.

Before WRIGHT, MacKINNON, and BORK, Circuit Judges.

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Interstate Commerce Commission. The issues have been fully briefed and argued by counsel, and they have been accorded full consideration by the court. The court has determined that they occasion no need for a published opinion. *See* Local Rule 13(c).

The power to order refunds of rates charged in excess of the maximum rates established under 49 US.C. § 10731(c) is a legitimate, reasonable, and direct adjunct to the Commission's statutory power to set maximum rates under that section. Therefore, the Commission's order was within its jurisdiction. *See Trans Alaska Pipeline Rate Cases,* 436 U.S. 631, 655 (1978). Petitioners have not met their burden of showing that the Commission's assessment of the equities of restitution was unreasonable or an abuse of discretion. *See Moss v. CAB,* 521 F.2d 298, 308 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 966 (1976); *Inspection in Transit, Grain and Grain Products,* 359 ICC 624, 634 (1979). Nor was the Commission's interpretation of its statutory mandate so inconsistent with the statute as to require reversal. *FEC v. Democratic Senatorial Campaign Committee,* ____ U.S. ____, ____, 50 USLW 4001, 4002 (November 10, 1981).

Petitioners' reliance upon *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370, 390 (1932), is misplaced, because the Commission's initial order never became final and was reversed by this court for legal error. In these circumstances, the Commission may, in accord with the principles of equity and the public interest, require carriers to refund excessive charges collected under the invalid initial order. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Atlantic Coast Line v. Florida*, 295 U.S. 301, 310 (1935); *Tennessee Valley Municipal Gas Ass'n v. FPC*, 470 F.2d 446, 452-453 (D.C. Cir. 1972).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petitions for review are hereby dismissed.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended November 30, 1981.

Per Curiam

For the Curt

/s/ George A. Fisher
George A. Fisher
Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 9, 1982
GEORGE A. FISHER
Clerk

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs cut out of time.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2296 September Term, 1985

Norfolk and Western Railway Company

v.

Interstate Commerce Commission and
United States of America

BEFORE: Ginsburg, Bork and Starr, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Interstate Commerce Commission and of intervenors National Association of Recycling Industries Inc., and the Alumninum Association, Inc., it is

ORDERED, by the Court, that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Starr would grant the petitions for rehearing.

United States Court of Apperals
For the District of Columbia Circuit
FILED APR 4 1986
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2296 September Term, 1985

Norfolk and Western Railway Company

v.

Interstate Commerce Commission and
United States of America

BEFORE: Robinson, Chief Judge; Writ, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr, Silberman and Buckley, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the Interstate Commerce Commission and of Intervenors The National Association of Recycling Industries, Inc., and the Aluminum Association, Inc., have been circulated to the full Court. A vote was requested and a majority of the judges of the Court in regular active service did not vote in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc,* that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Wald, Mikva, Starr and Buckley would grant the suggestions for rehearing *en banc*.

United States Court of Apperals
For the District of Columbia Circuit
FILED APR 4 1986
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2296 September Term, 1985

Norfolk and Western Railway Company

v.

Interstate Commerce Commission and
United States of America

BEFORE: Ginsburg, Bork and Starr, Circuit Judges

ORDER

Upon consideration of the Petition for Clarification filed by the Interstate Commerce Commission, it is

ORDERED, by the Court, that the petition is denied.

The Petition for Clarification filed by the Commission suggests that our decision in *Norfolk & Western Railway* v. *ICC,* 768 F.2d 373 (D.C. Cir. 1985), requires freezing the statutory ratio at 146% of variable costs. Petition for Clarification at 7. Nothing in our decision so held; indeed, a permanent freeze might violate the revenue-adequacy requirement of the Staggers Act, 49 U.S.C. §10731(e). We note in this regard that the Commission has suggested an alternative procedure for policing above-the-cap rate increases — an individual complaint system — which does

not require a freeze on the cap. Petition for Clarificaiton at 8 n.5.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Apperals
For the District of Columbia Circuit
FILED APR 4 1986
GEORGE A. FISHER
Clerk

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2157

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE ALUMINUM ASSOCIATION, INC., AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., PETITIONERS

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

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THE ALUMINUM ASSOCIATION, INC., AND NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., PETITIONERS

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NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in setting aside a 1983 Interstate Commerce Commission declaratory order authorizing shippers to seek reductions and refunds of rates for recyclable commodities on an individual rate basis.

1. Section 204(e) of the Staggers Rail Act of 1980, 49 U.S.C. 10731(e), required the nation's railroads to reduce within 90 days and thereafter to maintain freight rates for nonferrous recyclable commodities at revenue-to-variable cost ratio levels no higher than are necessary to maintain adequate railroad revenues and to preserve an economically sound transportation system.[1] In 1981, in the wake of the

[1] In *Ex Parte 394, Cost Ratio for Recyclables-1980 Determination*, 364 I.C.C. 425, 426 (1980), the Commission determined that the appropriate revenue-to-variable cost ratio was 146%. The Commission has revised this ratio from time to time.

court of appeals' decision in *National Ass'n of Recycling Industries, Inc.* v. *ICC* (*NARI III*), 660 F.2d 795 (D.C. Cir. 1981), the Commission both directed the railroads to adopt "territorial average rates" for recyclable commodities that would not exceed 146% of variable costs and instructed them to pay refunds for past overcharges based on those average rates. Pet. App. 5a-6a. The Commission had rejected as impractical the use of an individual rate reduction methodology (*i.e.*, reduction of each rate that was above the 146% ratio) to bring the rail industry into initial compliance with Section 204(e), but stated that "should a shipper of nonferrous recyclables believe that his particular rate still exceeds the permissible level, he may file a complaint with the Commission" (Pet. App. 7a).

The railroads complied with the Commission's 1981 decision by making rate reductions and by paying refunds pursuant to the territorial average rate reduction method. However, several shippers subsequently demanded that the railroads reduce certain individual rates which were still above the 146% ratio and pay them appropriate refunds. The railroads petitioned the Commission for an order clarifying their obligations under Section 204(e). In their petition, the railroads claimed that individual rate reductions could not be imposed where average rate reductions had been made and that requiring individual refunds, in addition to the territorial average refunds already paid, would force them to pay refunds twice. But the Commission rejected the railroads' arguments, holding that the "purpose of the averaging approach was simply to establish initial overall compliance. From the start, we contemplated individual adjustments in both directions that would maintain the overall level of compliance and in fact result in individual rates gravitating closer and closer to the 146-percent level" (Pet. App. 44a). The Commission therefore again

ruled that it would entertain complaint cases against individual rates that remained above the 146% level (Pet. App. 8a, 44a).

2. Upon the railroads' petition for review, the Court of Appeals for the District of Columbia Circuit reversed (Pet. App. 1a-24a). First, the court rejected the Commission's procedural argument that the individual rate question had been resolved in 1981 and that the 60-day time limit in the Hobbs Act, 28 U.S.C. 2344, therefore barred the railroads' present challenge (Pet. App. 9a-12a). The court stated that "in 1981 the Commission did not decide the question now presented" (Pet. App. 10a) and, accordingly, the present petition, which was filed within 60 days of the Commission's 1983 decision, was timely (Pet. App. 10a-11a). Next, the court held that the Commission's decision to entertain individual complaints, after requiring the railroads to reduce their rates (and pay refunds) pursuant to the territorial average rate reduction method, was contrary to the terms of Section 204(e), as construed in *NARI III* (Pet. App. 12a-17a). The court read Section 204(e), as construed in *NARI III*, to require only that the railroads immediately reduce their rates to a territorial average equal to or less than the 146% ratio; in the court's view, the statute allows the railroads to maintain individual rates above that average (although not to raise any individual rate that already equalled or exceeded that ratio) (Pet. App. 12a-15a). The court found the Commission's contrary reading to be statutorily unreasonable, concluding both that Congress had not intended the Commission to break with its past practice of requiring only average rate reductions and that the Commission's new interpretation would unfairly force the railroads to pay at least some double refunds (Pet. App. 15a-17a).

3. Petitioners claim that the court of appeals erred in two respects. First, they argue that the statute allows the Commission to entertain individual rate complaints against railroads that have made rate reductions pursuant to the territorial average rate method. Pet. 8-12. Second, they argue that, by allowing the railroads to obtain review of a matter that the Commission resolved in 1981, the court of appeals has frustrated the time limitations that the Hobbs Act imposes on parties seeking judicial review of ICC orders (Pet. 13-17). The federal respondents agree with petitioners' contentions, but believe that the significance of the court of appeals' decision is limited and this Court's review is not warranted.

a. The federal respondents share petitioners' view that the court of appeals misinterpreted Section 204(e) of the Staggers Act. Section 204(e), which is set forth at Pet. App. 4a-5a, is best understood as requiring the railroads to make both territorial average and individual rate reductions. The language of Section 204(e) does not support the court of appeals' conclusion that Congress intended that railroads would be required only to reduce their recyclables rates on the average. To the contrary, Section 204(e) states that the railroads "shall take all action necessary to reduce and thereafter maintain rates * * * at revenue-to-variable cost ratio levels that are equal to or less than" the specified level. Absent statutory language or legislative history to the contrary, the Commission has reasonably concluded that Congress did not intend to have some recyclables shippers paying rates below the statutory maximum while other, possibly competing, shippers are paying rates that are substantially higher.

However, the federal respondents did not seek certiorari and do not believe that this issue is significant enough to warrant this Court's review. The statutory provision involved in this case applies only to shipments of recyclable commodities by rail. The federal respondents are not aware of

any comparable statutory provision applicable to any other industry or administrative agency. Thus, the court of appeals' decision will have no effect beyond its effect on the parties to this litigation.

b. The federal respondents also agree with petitioners that the court of appeals erred in ruling that the railroads' petition was timely under the Hobbs Act. The Commission believes, contrary to the court of appeals' view (Pet. App. 9a-11a), that it in fact resolved in 1981 that shippers could complain that their individual rates were excessive. See Pet. App. 101a. The Commission necessarily resolved that question in 1981 in deciding how the railroads could bring their rates into compliance with the statutory rate ceiling. Accordingly, the Hobbs Act should have been held to bar the railroads' attempt to obtain judicial review of this issue in 1983.

However, we do not believe that this issue warrants this Court's review. The court of appeals acknowledged that the Hobbs Act establishes a 60-day time limit for seeking judicial review of ICC orders. The court found that the question whether individual complaints could be filed had not been decided in 1981 and, accordingly, that the Hobbs Act did not foreclose judicial review in 1983. Pet. App. 9a-11a. The court of appeals' decision was thus based on its view of the history of these proceedings and not on any ruling of broader significance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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ROBERT S. BURK
General Counsel
Interstate Commerce Commission

AUGUST 1986

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE ALUMINUM ASSOCIATION, INC., and
NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF THE RESPONDENT RAILROADS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly construed Section 204 of the Staggers Act of 1980, 49 U.S.C. § 10731(e), to preclude duplicative reductions and refunds of non-ferrous recyclable rates previously found to be in aggregate compliance with Section 204?

2. Whether the Court of Appeals correctly found, based on its review of the record in this case including pertinent pleadings and prior agency orders, that the railroads' challenge to such duplicative reductions and refunds was timely?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2157

THE ALUMINUM ASSOCIATION, INC., and
NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM OF THE RESPONDENT RAILROADS IN OPPOSITION

The respondent railroads [1] join the respondents United States and Interstate Commerce Commission in opposing the petition for certiorari in this case.[2]

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[1] The railroad respondents are listed at p. 1a, below, and the information required by Rule 28.1 is provided at p. 1b, below.

[2] The certiorari petition is cited as "Pet.____" and the separate appendix as "Pet. App.____"

STATEMENT OF FACTS

In 1980, Congress enacted the Staggers Act, 94 Stat. 1895, primarily to reduce excessive railroad regulation and improve the opportunity of financially hard-pressed railroads to earn adequate revenues. In Section 204 (reprinted Pet. 2), now codified at 49 U.S.C. § 10731(e), Congress adopted a special provision governing rates on recyclable commodities other than iron and steel scrap. Section 204 required that railroads reduce rates on such recyclables within 90 days to a formula-based "cap" level and provided that thereafter any rate that exceeded that level should not be required to bear any further rate increase.[3]

Less than a year after passage of the Staggers Act, the D.C. Circuit construed Section 204 in *NARI III*.[4] The court held that under the first sentence of Section 204 an immediate reduction of recyclable rates to the cap level was required and that it could be computed on the basis of territorial averages. 660 F.2d at 799.[5] Thereafter, under the second sentence of Section 204, any individual rate that still exceeded the cap level could not be increased until it had fallen below the cap level. *Id.*

On remand from *NARI III*, the ICC in October 1981 ordered immediate reductions of recyclable rates to the

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[3] The cap level, recomputed periodically by the ICC under the statutory formula, establishes a cap on rates based on the variable costs of the traffic.

[4] *National Ass'n of Recycling Industries* v. *ICC*, 660 F.2d 795 (D.C. Cir. 1981).

[5] The use of territorial averages treats groupings of rates (*e.g.*, rates on all copper scrap moving within the West) as a unit for purposes of making adjustments. Such averaging is widespread in utility and carrier ratemaking and territorial averages had been used in prior ICC recyclable proceedings.

cap level, including refunds from the effective date of Section 204.[6] The ICC specifically approved the use of territorial averages in making such adjustments, specifying the territorial average groupings to be used. 365 I.C.C. at 305-07 (Pet. App. 98a-101a). The railroads complied by reducing their recyclable rates and paying millions of dollars in refunds to shippers based on the territorial average computations approved by the Commission.[7] In approving the use of territorial averages, the ICC expressly concluded that "this method will best serve the purposes Congress intended to achieve with section 204." *Id.* at 307 (Pet. App. 101a). After investigation and minor adjustments, the Commission concluded that the railroads were in compliance with its decision.[8]

Following the railroads' reductions and refunds, several shippers filed complaints attacking the *same* rates, requesting additional millions of dollars in reductions and refunds. The shippers' theory was that, because the use of territorial averages necessarily left some individual rates above the cap level and some below it, shippers were entitled to "sharpshoot" those individual rates that remained above the cap level. The railroads protested to the Commission that the use of territorial averages had been approved by *NARI III* and the Commission itself

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[6] *Ex Parte No. 394,* 365 I.C.C. 304 (1981) (reprinted Pet. App. 96a), *modified,* order served November 27, 1981 (reprinted Pet. App. 92a), *aff'd sub nom. Baltimore & O.R.R.* v. *ICC,* No. 82-1066 (D.C. Cir., June 9, 1982) (reprinted Pet. App. 107a).

[7] Conrail chose a different course, later upheld by the Commission, which involved cancellation of its joint rates on recyclables and the substitution of new scale rates applicable only to Conrail traffic. Chessie followed the Conrail approach for some commodities. Virtually all of the other railroads followed the territorial average approach approved by the Commission.

[8] *Ex Parte No. 394,* served December 6, 1982 (reprinted Pet. App. 75a); *Ex Parte No. 394,* served May 20, 1983 (reprinted Pet. App. 52a).

and that the new complaints would permit duplicative reductions and recoveries. Nevertheless, in July 1983 the Commission held that complaints to obtain such further reductions and refunds would be permitted.[9]

In the decision sought to be reviewed in this case—*NARI VI*[10]—the D.C. Circuit reversed the ICC. Construing Section 204 consistently with *NARI III*, the court held that the railroads had properly complied with the statute by making their reductions and refunds on a territorial average basis, as approved by the Commission itself. The court said that Section 204's second sentence provided the explicit remedy for any individual rates that remained above the cap by forbidding further increases in those rates until they were eroded by inflation to below the cap level. The court did not preclude shippers from using complaints to attack individual recyclable rates where shippers alleged that individual rates already above the cap level had been impermissibly increased.[11]

ARGUMENT

This case meets none of the traditional requisites for certiorari. The decision below involved a one-time construction of a regulatory statute on a single limited issue: whether recyclable rates, already reduced to the cap level on a territorial average basis, could be the subject of

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[9] *Ex Parte No. 394*, 367 I.C.C. 623 (1983) (reprinted Pet. App. 25a).

[10] *Norfolk & W. Ry.* v. *ICC*, 768 F.2d 373 (D.C. Cir. 1985) (reprinted Pet. App. 1a). *NARI VI* is the *B&O* case (cited p. 3, n.6, above); and *NARI V* (cited Pet. 4, n.2) involved Conrail's tariffs complying with Section 204. See p. 3, n.7, above.

[11] Following the court's decision, the ICC invited the shippers to amend their pending complaints to conform to *NARI VI* or to file new complaints making such allegations. *Ex Parte No. 394*, decided June 6, 1986, p. 3 & n.3.

"sharpshooting" complaints seeking further reductions and refunds of the same reduced rates. There is no conflict between the decision below and any decision of this Court or any other circuit. The only other case that previously addressed the same issue, the D.C. Circuit's decision in *NARI III*, accords with the decision below.

1. The ultimate responsibility for construing a regulatory statute resides in the courts.[12] Through a succession of cases involving recyclables, the D.C. Circuit has become uniquely familiar with the history of such regulation and Congress' successive revisions of the statute. See Pet. 4, n.2 (listing cases). In this case, the D.C. Circuit construed Section 204 in accordance with its literal language, prior practice and precedent, and elementary fairness.

In 1981, both the D.C. Circuit (in *NARI III*) and the Commission (in its October 1981 order) ruled that the railroads could comply with the first sentence of Section 204 by using territorial averages to adjust their recyclable rates to the statutory cap. The use of such territorial averages is, as the Commission found, the most feasible way of making broad-scale rate changes without disrupting the entire rate structure.[13] Such territorial average adjustments had been used by the ICC in the past in regulating recyclable rates as well as other commodities.[14] It is the essence of such group averaging, familiar through-

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[12] See, *e.g.*, *Louisiana Public Service Comm'n* v. *FCC*, 106 S. Ct. 1890 (1986); *SEC* v. *Sloan*, 436 U.S. 103 (1978); *NARI III*, 660 F.2d at 799 (citing cases).

[13] There are thousands of individual rates and, as the ICC found in *Ex Parte No. 394, supra*, 365 I.C.C. at 307 (Pet. App. 101a), "it would not be feasible to require the carriers to develop ratios for every individual movement."

[14] *Ex Parte No. 319*, 356 I.C.C. 114, 449-50 (1977), *remanded on other grounds, National Ass'n of Recycling Industries, Inc.* v. *ICC*, 585 F.2d 522 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

out carrier and utility ratemaking,[15] that some individual rates will be above and some below the average.

The second sentence of Section 204 deals with such individual departures by providing, in explicit terms, that as long as any rate "equals or exceeds such average revenue-to-variable ratio [cap] . . . such rates shall not be required to bear any further rate increase." This construction, as the lower court pointed out, gives meaning to both sentences of Section 204.[16] It also avoids duplicative rate reductions or refunds for the railroads, and it means that inflation will ultimately bring all recyclable rates under the cap.

The claim in the certiorari petition (Pet. 12) that shippers are "back to square one" is nonsense. The basic aim of Section 204, as the ICC itself recognized, was achieved by the reduction of recyclable rates to the statutory cap level based on territorial averages. See p. 3, above. Those territorial averages embrace *all* recyclable rates in every segment where the rates exceeded the cap level. Far from denying the shippers the use of the complaint remedy (*cf.* Pet. 16), the D.C. Circuit reaffirmed that complaints *could* be used by shippers wherever railroads impermissibly raised individual rates that are already above the cap level.[17] What the court precluded is

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[15] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Chicago & N.W. Ry.* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 326 (1967); *New England Divisions Cases*, 261 U.S. 184 (1923).

[16] The shippers are quite mistaken in suggesting (Pet. 9) that the lower court has read "rates" to have one meaning in the first sentence and another meaning in the second sentence of Section 204. In each case, the same rates are involved.

[17] The lower court made clear that it was not forbidding individual complaints "for policing above-the-cap rate increases." Order of April 4 1986 (Pet. App. 113a-114a). The Commission has adopted the same reading of the court's opinion in inviting shippers to amend their pending complaints to conform to *NARI VI*. See p. 4, n.11, above.

complaints that effectively seek further reductions or refunds of rates already reduced to the cap level on a territorial average basis.

2. The shippers' claim that the lower court violated the Hobbs Act [18] is, if anything, an even weaker candidate for review on certiorari than the claim under Section 204. Under the Hobbs Act, a party aggrieved by an ICC order may seek review in the Court of Appeals within 60 days after that order. 28 U.S.C. § 2344. The railroads complied with the terms of the Hobbs Act by seeking review within 60 days of the ICC order released July 20, 1983. That order explicitly considered and rejected the railroads' objection to complaints seeking further reductions and refunds of rates already reduced to the cap level on a territorial average basis. See p. 4 & n.9, above.

The shippers do not dispute that the railroads' petition for review was filed within 60 days of the July 20, 1983, ICC order. The gist of their claim is that the same issue resolved in the July 20, 1983, order had already been litigated and conclusively resolved against the railroads in the ICC's October 1981 order that approved the use of territorial averages. Pet. 13. No issue of law is presented by this claim because the lower court found, based on a review of the pleadings and orders involved, that the issue had not been litigated and conclusively resolved by the Commission in 1981.

There was ample basis for the D.C. Circuit's evaluation of the record:

- The issue of sharpshooting complaints following territorial average reductions and refunds was not addressed in any way in the pleadings that led up to the October 1981 order. *NARI VI*, 768 F.2d at 377 (Pet. App. 10a).

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[18] The Hobbs Act, 28 U.S.C. § 2341, *et seq.*, governs review of ICC orders in the Courts of Appeals.

- At the outset of the October 1981 order, in the listing of issues to be addressed in the decision, the issue of sharpshooting complaints was not mentioned as an issue to be resolved. 365 I.C.C. at 305 (Pet. App. 97a-98a).

- The October 1981 order contained no discussion of the various arguments concerning the permissibility *vel non* of such sharpshooting complaints. Compare 365 I.C.C. at 307 (Pet. App. 101a).

- The resolution of the issue was not necessary to the result reached in the October 1981 order approving territorial average adjustments and the ordering paragraphs did not address the sharpshooting issue in any way. 365 I.C.C. at 310 (Pet. App. 105a).

Even if the issue of sharpshooting complaints had been litigated and decided by the Commission in October 1981—which it was not—it is virtually certain that judicial review of the issue would not have been ripe at that time. *NARI VI,* 768 F.2d at 378 (Pet. App. 11a).[19] At that time, no such complaints had been filed (*id.*) and there was no basis for knowing whether any complaints would ever be filed after the territorial average reductions and refunds had been made. When shippers later did file such complaints, the railroads promptly sought a determination of their validity by the Commission. After the Commission ruled against the railroads in July 1983, they sought

[19] Indeed, several years later, after such complaints had in fact been filed and after the Commission had explicitly approved their use (in the July 1983 order) the ICC was still scarcely willing to admit that the issue of their validity was ripe for judicial review. See *NARI VI,* 768 F.2d at 378 (Pet. App. 11a). It is patent that the ICC would have effectively resisted judicial review on that issue if it had been sought in October 1981.

judicial review within 60 days following that determination. *Id.*

In sum, the shippers' procedural claim raises no question of law or principle, let alone one presenting a conflict between the circuits. The lower court created no "exception" to the Hobbs Act (Pet. 13) or *res judicata* principles. It simply found based on the record in this case that the issue in question had not previously been litigated and conclusively resolved by the agency. Such a fact-based controversy is plainly not appropriate for review on certiorari under the rules of this Court. See Sup. Ct. R. 17.1(a).

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

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September 1986

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RESPONDENT RAILROADS

Atchison, Topeka & Santa Fe Railway Company
Baltimore and Ohio Chicago Terminal Railroad Company
Baltimore & Ohio Railroad Company
Boston & Maine Railroad
Burlington Northern, Inc.
Chesapeake and Ohio Railway Company
Chicago and North Western Transportation Company
Cincinnati, New Orleans & Texas Pacific Railway Company
Consolidated Rail Corporation
CSX Transportation, Inc. (successor to Seaboard System Railroad, Inc. and Louisville & Nashville Railroad Company)
Delaware and Hudson Railway Company
Denver and Rio Grande Western Railroad Company, The
Elgin, Joliet and Eastern Railway Company
Grand Trunk Western Railroad Company
Green Bay and Western Railroad Company
Illinois Central Gulf Railroad Company
Kansas City Southern Railway Company
Louisiana & Arkansas Railway Company
Missouri-Kansas-Texas Railroad Company
Norfolk & Western Railway Company
Oklahoma, Kansas and Texas Railroad Company
Pittsburgh & Lake Erie Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
San Diego and Arizona Eastern Transportation Company
Santa Maria Valley Railroad Company
Soo Line Railroad Company (in its own right and as successor to Chicago, Milwaukee, St. Paul & Pacific Railroad Company)
Southern Pacific Transportation Company
Southern Railway Company

Terminal Railroad Association of St. Louis
Texas Mexican Railway Company, The
Ventura County Railway Company
Vermont Railway, Inc., The
Winston-Salem Southbound Railway Company

RULE 28.1 LISTING

The names of parent companies and of non-wholly-owned subsidiaries or affiliates of respondent railroads are set forth below. The names of respondents are capitalized for ease of reference. Counsel construes Rule 28.1 as not requiring the listing of affiliates of a respondent where such affiliates are wholly-owned by a named parent.

Santa Fe-Southern Pacific Corp. is the parent of respondents THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC TRANSPORTATION COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Arkansas & Memphis Railway Bridge & Terminal Company
Central California Traction Company
Evergreen Leasing Corporation
Ogden Union Railway & Depot Company, The
Portland Terminal Railroad Company
Portland Traction Company
Santa Fe Energy Partnerships, Ltd.
Santa Fe Natural Resources, Inc.
Southern Pacific Company
Sunset Railway Company
Trailer Train Company

Guilford Transportation Industries, Inc. is the parent of respondents BOSTON AND MAINE RAILROAD and DELAWARE AND HUDSON RAILWAY COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Albany Port Railroad
Albany and Vermont Railroad
Northern Railroad

Saratoga and Schenectady Railroad
Stony Brook Railroad Corporation
Vermont and Massachusetts Railroad Company

The CSX Corporation is the parent of respondents BALTIMORE AND OHIO RAILROAD COMPANY, CHESAPEAKE AND OHIO RAILWAY COMPANY, CSX TRANSPORTATION, INC. (formerly SEABOARD SYSTEM RAILROAD, INC. and LOUISVILLE & NASHVILLE RAILROAD COMPANY), RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY and WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Allegheny and Western Railway Company
Augusta and Summerville Railroad Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Baltimore and Philadelphia Railroad Company, The
Beaver Street Tower Company
Belt Railway Company of Chicago
Central Railroad Company of South Carolinia, The
Central Transfer Railway and Storage Company, The
Chatham Terminal Company
Chicago and Western Indiana Railroad Company
Clearfield and Mahoning Railway Company
Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Eastern Hardwoods, Incorporated
First Georgia Development Corporation
Fruit Growers Express Company
High Point, Thomasville & Denton Railroad Company
Home Avenue Railroad Company, The
James Center Development Company
Littleton Fuel Company

Mid Allegheny Corporation
Nashville & Decatur Railroad Company
New Gauley Coal Corporation
North Charleston Terminal Company
Paducah & Illinois Railroad Company
Richmond-Washington Company
Sea-Land Corporation
Wesjax Development Company
Woodstock & Blocton Railway Company

Burlington Northern, Inc., is the parent of respondent BURLINGTON NORTHERN RAILROAD COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Belt Railway Company of Chicago, The
BN Financial Services, Inc.
Burlington Northern Airmotive, Inc.
Burlington Northern International Services, Inc.
Burlington Northern Railway Company
Butte Pipe Line Company
Camas Praire Railroad Company
Chicago Union Station Company
Colt Intermodal Inc.
Davenport, Rock Island and North Western Railway Company
Denver Union Terminal Railway Company, The
El Paso Company
Galveston Terminal Railway Company
Glacier Park Company
Glacier Park Liquidating Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Lake Superior Terminal and Transfer Railway Company, The

Longview Switching Company
Meridian Land & Mineral Company
Milestone Petroleum, Inc.
Minnesota Transfer Railway Company, The
New Mexico and Arizona Land Company
Paducah & Illinois Railroad Company
Plum Creek Timber Company, Inc.
Portal Pipeline Company
Portland Terminal Railroad Company
Pueblo Union Depot and Railroad Company, The
R-M Holdings Corporation
St. Paul Union Depot Company, The
Trailer Train Company
Wichita Union Terminal Railway Company, The
Winona Bridge Railway Company

Norfolk Southern Corporation is the parent of respondents CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, and SOUTHERN RAILWAY COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Airforce Pipeline, Inc.
Alabama Great Southern Railroad Company, The
Algers, Winslow and Western Railway Company
Arrowood-Southern Company
Arrowood Southern Executive Park, Inc.
Athens Belt Line Railroad Company
Atlanta and Charlotte Air Line Railway Company, The
Atlanta Terminal Company
Atlantic and East Carolina Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company
Beaver Street Tower Company
Birmingham Terminal Company
Blue Ridge Railway Company

Camp Lejeune Railroad Company
Central of Georgia Railroad Company
Central Transfer Railway and Storage Company
Charlotte-Southern Corporation
Chatham Terminal Company
Chattanooga Station Company
Chattanooga Terminal Railway Company
Chesapeake Western Railway
Cincinnati Southern Railway
Citico Realty Company
Danville and Western Railway Company
Dereco, Inc.
Durham and South Carolina Railroad Company
Elberton Southern Railway Company
Fairport, Painesville and Eastern Railway Company
Fort Wayne Union Railway Company
1575 Eye Street Associates (Limited Partnership)
Georgia Midland Railway Company, The
Georgia Northern Railway Company, The
Georgia Southern and Florida Railway Company
High Point, Randleman, Asheboro and Southern Railroad Company
Interstate Railroad Company
Lake Erie Dock Company
Lambert's Point Docks, Incorporated
Lenoir Car Works
Live Oak, Perry and South Georgia Railway Company
Louisiana Southern Railway Company
Memphis and Charleston Railway Company
Mobile and Birmingham Railroad Company
Norfolk Southern Railway Company
Northern Ohio Food Terminal, Inc.
NW Equipment Corporation
Pocahontas Development Corporation
Pocahontas Kentucky Corporation
Pocahontas Land Corporation
Akron & Barberton Belt Railroad Company, The

Nickel Plate Improvement Company, Inc., The
Scioto Valley and New England Railroad Company, The
Shenandoah-Virginia Corporation
Toledo Belt Railway Company, The
National Investment Company, The
New Orleans Terminal Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Industrial Development Corporation
North Carolina Midland Railroad Company, The
North Carolina Railroad Company, The
North Charleston Terminal Company
Ocean Steamship Company of Savannah
Pine Brook Center Limited (Limited Partnership)
Queen City Developers (Limited Partnership)
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
St. Johns River Terminal Company
700 North Fairfax Street Limited Partnership
The South Western Rail Road Company
Southern Rail Terminals, Inc.
Southern Rail Terminals of Alabama, Inc.
Southern Rail Terminals of North Carolina, Inc.
Southern Railway-Carolina Division
Southern Region Coal Transport, Inc.
Southern Region Distribution Services, Inc.
Southern Region Industrial Realty, Inc.
Southern Region Investment Company
Southern Region Materials Supply, Inc.
Southern Region Motor Transport, Inc.
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Terminal Properties, Inc.
Terminal Railroad Association of St. Louis
Trailer Train Company

Transylvania Railroad Company
Virginia Holding Corporation
Virginia and Southwestern Railway Company
Wabash Railroad Company
Wheeling and Lake Erie Railway Company, The
Woodstock & Blocton Railway Company
Yadkin Railroad Company

The CNW Corporation is the parent of respondent CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Lake Superior Terminal & Transfer Railway Company of the State of Wisconsin, The
Minnesota Transfer Railway Company, The
Peoria and Pekin Union Railway Company
Railbox Company
St. Paul Union Depot Company
Trailer Train Company

Canadian Pacific Limited is the parent of respondent SOO LINE RAILROAD COMPANY which is successor to respondent CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILWAY COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Algoma Steel Corporation, Limited, The
AMCA Holdings (U.K.) Limited
AMCA International Limited
American Reinforcing Inc.
Amtel Chimie et Plastiques
Arrendadora Korco, S.A. de C.V. (Mexico)
Bedford Belt Railway Company, The
Belt Railway of Chicago

Bilsa, S.A.
Bomag Australia PTY Ltd.
Bomag-Nenck B.m.b.H.
Bomag S.A.F.
Brosses Osborn S.A.
Brushes International PLC (U.K.)
Brushes International do Brazil
Canada Line Agencies Limited, The
Canada Line Limited, The
Canada Line Services Limited, The
Canadian Pacific Enterprises Limited
Candian Pacific Oil and Gas Norway A/S
CanPac Maritime Agencies Limited
Cascade Pipe Line Limited
Cherry Burrell Holdings Corporation
Chicago, Terre Haute and Southeastern Railway Company
Cominco Ltd.
Compaloc
Corporate Foods Limited
Dandix, Inc. (U.S.A.)
Davenport, Rock Island and North Western Railway Company
Dendix Brushes Limited (U.K.)
Desa Industries (U.K.) Limited
Dominion Atlantic Railway Company, The
Dominion Bridge Sultzer, Inc.
Eastern Bakeries Limited
Energy Development (Management) Limited
Falt Towing Ltd.
Gem Power Brushes, Limited (U.K.)
Giddings & Lewis Foundation Inc.
Great Lakes Forest Products Limited
Greenex A/S
Hawaiian Western Steel Limited
Indiana Harbor Belt Railroad Company
Intrumentation Services, S.A.

Imodco International Inc.
KCL Leasing
Kansas City Terminal Railway Company
Kingston and Pembroke Railway Company, The
Koering Leasing
Koering Leasing Partners
Kremzar Gold Mines Limited
Lake Champlain and St. Lawrence Junction Railway Company, The
Lake Erie and Northern Railway Company, The
Lake St. Joseph Iron Inc.
Lake Superior Terminal and Transfer Railway Company
Litwin Arabia Ltd.
Litwin (U.K.) Limited
Manitoba and North Western Railway Company of Canada
Maple Shipping Company (U.K.) Limited
Marathon Aviation Terminals Limited
Massawippi Valley Railway Company
Mayo Forest Products Ltd.
Minnesota Transfer Railway Company, The
Montreal and Atlantic Railway Company, The
National Hardware Specialties Limited
Nippon Bomag C., Ltd. (Japan)
OTM Limited
Ontario and Quebec Railway Company
Orbs-Johnson Systems, Inc.
Osborn Foundry Machinery, Ltd.
Osborn International G.m.b.H. (W. Germany)
PanCanadian Petroleum Denmark A/S
PanCanadian Petroleum Limited
Pine Point Mines Limited
Pitt Street Developments Limited
Polytec S.A.R.L.
Princeton Gold Mines Limited
Ptarmigan Mines Limited
Robison Mines Limited

Rycon Mines Limited
Societe Anonyme des Machines Osborn (France)
St. Lawrence and Ottawa Railway Company, The
St. Paul Union Depot
Sault Ste. Marie Bridge Company
Soo Line Corporation
Southern Indiana Railway Company, The
Steep Rock Resources Inc.
Sunloch Mines Limited
Sunro Mines Limited (N.P.L.)
T.E.B.A. B.V.I.O. (The Netherlands)
Telesat Canada
Toronto, Grey and Bruce Railway Company
Toronto Terminals Railway Company, The
Trailer Train Company
Vestgron Mines Limited
Village Green Mall Ltd.
Vol Mines Limited
Webb Jarratt & Company Limited
Western Fabricators Inc.
Western Metal Products Inc.

Respondent CONSOLIDATED RAIL CORPORATION is the parent of the following related companies that have or may have outstanding securities in the hands of the public:

Akron & Barberton Belt Railroad Company
Albany Port Railroad Company
Belt Railway Company of Chicago
Calumet Western Railway Company
Chicago and Western Indiana Railway Company
Conrail Equity Corporation
Indiana Harbor Belt Railroad Company
Lakefront Dock and Railroad Terminal Company
Monongahela Railway Company
Nicholas, Fayette and Greenbrier Railroad Company
Peoria and Pekin Union Railway Company

Pittsburgh, Chartiers and Youghiogheny Railway Company
Railroad Association Insurance Ltd.

Kansas City Southern, Inc. is the parent of respondents KANSAS CITY SOUTHERN RAILWAY COMPANY and LOUISIANA & ARKANSAS RAILWAY COMPANY.

Katy Industries, Inc. is the parent of respondent MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, which is in turn the parent of respondent OKLAHOMA-KANSAS-TEXAS RAILROAD COMPANY. Related companies that have or may have outstanding securities in the hands of the public are:

Galveston, Houston and Henderson Railroad Company
Joplin Union Depot Company
Kansas City Terminal Railway Company
Oklahoma City Junction Railway Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Wichita Union Terminal Railway Company

Itel Corp. is the parent of respondent GREEN BAY AND WESTERN RAILROAD COMPANY.

USX Corporation is the parent of respondent ELGIN, JOLIET AND WESTERN RAILWAY COMPANY.

The Anschutz Corporation is the parent of Rio Grande Industries, Inc., which is the parent of respondent DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY.

IC Industries, Inc. is the parent of respondent ILLINOIS CENTRAL GULF RAILROAD COMPANY.

Grand Trunk Corporation is the parent of respondent GRAND TRUNK WESTERN RAILROAD COMPANY.

Respondent TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS is wholly owned by other railroads that are listed respondents in this case.

Supreme Court, U.S.
FILED
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No. 85-2157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE ALUMINUM ASSOCIATION, INC.,
and
NATIONAL ASSOCIATION OF
RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS THE ALUMINUM ASSOCIATION, INC. and NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.

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THE ALUMINUM ASSOCIATION, INC.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS THE ALUMINUM ASSOCIATION, INC. and NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.

This brief is submitted in reply to the Oppositions filed by the federal Respondents and the railroad Respondents.

I. REPLY TO THE FEDERAL RESPONDENTS

The Government agrees with Petitioners with respect to the proper interpretation and implementation of Section 204(e) and with respect to the timeliness of the appeal under the Hobbs Act. The Government's position is that the Court erred on both counts. Nevertheless, the Government concluded that the issues raised are not of sufficient significance to warrant review.

This startling conclusion was reached in spite of the fact that transportation issues in the recycling industry have been a matter of continuing concern to Congress and the Courts over the past twelve years. As pointed out in the Petition (p. 4), Congress has passed three statutes, the purpose of which has been to rectify and restructure inequitable freight rates on recyclable commodities. Litigation arising out of these statutes has resulted in two investigations of major proportions before the Interstate Commerce Commission,[1] and six decisions of the United States Court of Appeals for the District of Columbia Circuit. Pet., p. 4. Moreover, transportation issues in the recycling industry have been reviewed by this Court three times.[2] At a time when these longstanding issues were about to be resolved, the appellate court's decision has blown the legislative remedy apart and it is indeed disappointing that the Government now believes the recycling industry is so unimportant that the erroneous decision of the appellate court should be allowed to stand.

The fact is, of course, that recycling is a growing, dynamic new industry in the United States. Its vitality is fueled by the continuing need to develop an economical and environmentally sound method of disposing of the vast amounts of waste generated in our industrial society.[3] Recycling is directly concerned with the National Environmental Policy Act.[4] Recycled aluminum results in an enormous saving of energy in furtherance of the poli-

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[1] *Ex Parte No. 319*, 356 ICC 113 (1977); *Ex Parte No. 394*, 365 ICC 304 (1980).

[2] *Consolidated Rail Corp.* v. *NARI*, 449 U.S. 609 (1981); *Aberdeen and Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *United States* v. *SCRAP*, 412 U.S. 669 (1973).

[3] *National Association of Recycling Industries v. ICC*, 585 F.2d 522, 527 fn. 16 (D.C. Cir. 1978).

[4] 42 U.S.C. § 4312.

cies of the Energy Conservation Policy Act.[5] Waste paper is generated in vast quantities and much of it can be recycled for a variety of uses. Recycled aluminum cans are the principal containers for the $70 billion beverage industry in furtherance of the policies of the Solid Waste Disposal Act.[6] The critical importance of recyclable materials continues to be emphasized by legislative and administrative proceedings on the federal, state and local levels which are concerned with utilization and disposal of solid waste.[7] Economical transportation of waste material is vital for the continued viability of recycling.

As a result of the decision of the United States Court of Appeals under consideration herein, shippers of recyclable commodities are powerless to bring complaints before any administrative or judicial body to secure compliance with maximum rate orders issued by the Interstate Commerce Commission. As it now stands, the Commission is required to set a maximum level for recyclable commodities each year, but no shipper has any right to have such maximum rate order applied to movements of his commodities. It is plain that such an irrational interpretation has virtually destroyed the effectiveness of Section 204(e) and has frustrated the purpose of the Act.

The Government also agrees with Petitioners that the time limitations of the Hobbs Act should have precluded appellate review in this case. The Government's view of the Hobbs Act decision is that, while erroneous, it will have no adverse effect of broad significance. This is undu-

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[5] 42 U.S.C. § 6201.

[6] 42 U.S.C. § 6901.

[7] The problems of disposal of solid waste and the efforts of states to restrict disposal within their borders were encountered by this Court in *City of Philadelphia* v. *New Jersey*, 437 U.S. 628 (1978).

ly simplistic. If the validity of the complaint procedure was decided in 1981 (and the Government concedes it was), surely the railroads were under some time limitation to file a petition for review. The Government contends there is no issue of law involving the Hobbs Act because the Court concedes that such a petition must be filed within sixty days after the issuance of the final order.

However, the Court of Appeals permitted the railroads to revisit the issue decided in 1981, in July of 1983 – nearly two years later. Thus, under the Court's theory, an issue decided by the administrative agency may be reviewed at any time in the future by the simple process of filing a Petition for Reopening or, as here, a Petition for Declaratory Order. Such unrestricted procedure leads to monstrous injustice to parties attempting to follow the agency's order. In this case, more than twenty shippers of recyclable commodities filed complaints committing a large expenditure of funds and manpower to follow a procedure prescribed by the Commission and apparently unopposed by the railroads. To permit the railroads to then challenge the procedure years later is the very type of injustice which the Hobbs Act was designed to prevent.

Nor is the recyclable complaint procedure an isolated case as the Government suggests. The rationale of the appellate court's holding could have an adverse impact in a variety of situations. For example, in a licensing proceeding, where a utility applicant is granted a certificate of public convenience to construct a facility and serve a specified market area, it would be unthinkable for a competing utility, which was a party to the licensing proceeding, to wait until the plant to provide such service has been constructed and then challenge the issuance of the license by means of filing a petition to reconsider and then

an appeal. In essence, however, that type of procedure is condoned by the appellate court's decision here.

II. REPLY TO THE RAILROAD RESPONDENTS

The railroads oppose the petition principally by attempting to stigmatize the nature of the complaints filed by shippers requesting reductions in their rates and refunds. Seven times in the course of their nine-page brief the railroads refer to the complaints as "sharp shooting" complaints, Evidently the term is intended to convey the notion that Petitioners have undertaken action which is morally reprehensible or, in some fashion, have seized upon an unintended remedy to secure a windfall at the expense of the overburdened rail carriers. However, these complaints were filed pursuant to specific orders of the Interstate Commerce Commission referred to and repeated at least three times during the course of the Ex Parte No. 394 investigation. App. 101a, 90a, 44a. At no time were any of the shippers under any illusions that the territorial average reductions would constitute anything other than token compliance with the statutory mandate. Ultimately, all parties understood that if Section 204(e) was to be effective, compliance must be obtained by actions brought by the shippers. The complaint procedure was developed by the Commission. Petitioners faithfully followed the Commission's directions and filed complaints. No motions to dismiss were filed. The railroads' tactic, obviously, is an attempt to divert attention from the erroneous interpretation of the statute by the appellate court.

The railroads insist that there is no issue of law involved in the Hobbs Act decision. They cite the fact that their Petition for Review was filed within sixty days from the denial of their Petition for Declaratory Order. That peti-

tion was in substance a petition for reconsideration and was treated as such by the Commission. App. 44a. Thus, the legal issue before this Court is whether the filing of a petition requesting reconsideration of an issue decided two years earlier will allow the issue to be reviewed in spite of the sixty-day time limit in the Hobbs Act. The Court of Appeals firmly rejected such a ploy in 1984,[8] but the same court has permitted it in this case just two years later.

[8] *National Bank of Davis* v. *Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir. 1984).

III. CONCLUSION

The Government and Petitioners agree that the decision of the Court below was erroneous and should not be sustained. The Opposition of the railroads does nothing to refute the arguments of Petitioners on the merits. Accordingly, the Writ of Certiorari should therefore be granted.

Respectfully submitted,

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